LOAN DOCUMENT

PHOTOGRAPH THIS SHEET

DTIC ACCESSION NUMBER

LEVEL

TJAGSA

0

INVENTORY

Coercive Sexual Intercourse : ...

DOCUMENT IDENTIFICATION

APR 1999

DISTRIBUTION STATEMENT A
Approved for Public Release
Distribution Unlimited

DISTRIBUTION STATEMENT

HANDLE WITH CARE

ACCESSION FOR

NTIS GRA&I ☐
DTIC TRAC ☐
UNANNOUNCED ☐
JUSTIFICATION

BY

DISTRIBUTION/

AVAILABILITY CODES

DISTRIBUTION	AVAILABILITY AND/OR SPECIAL	
A		

DISTRIBUTION STAMP

DATE ACCESSIONED

DATE RETURNED

20061026076

DATE RECEIVED IN DTIC

REGISTERED OR CERTIFIED NUMBER

PHOTOGRAPH THIS SHEET AND RETURN TO DTIC-FDAC

DTIC FORM 70A JUN 90

DOCUMENT PROCESSING SHEET

PREVIOUS EDITIONS MAY BE USED UNTIL STOCK IS EXHAUSTED.

LOAN DOCUMENT

"COERCIVE SEXUAL INTERCOURSE": A PROPOSAL TO AMEND ARTICLE 120, UCMJ, TO PREVENT THE MISAPPLICATION OF THE "PARENTAL DURESS" THEORY OF THE "CONSTRUCTIVE FORCE" DOCTRINE OF RAPE

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

BY MAJOR MARTIN L. SIMS
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES ARMY

47TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 1999

"COERCIVE SEXUAL INTERCOURSE": A PROPOSAL TO AMEND ARTICLE 120, UCMJ, TO PREVENT THE MISAPPLICATION OF THE "PARENTAL DURESS" THEORY OF THE "CONSTRUCTIVE FORCE" DOCTRINE OF RAPE

MAJOR MARTIN L. SIMS*

* Judge Advocate General's Corps, United States Army. Presently assigned to the 47th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, B.A., 1987, Vanderbilt University; J.D., 1990, University of Tennessee School of Law; Formerly assigned as the Military Legal Assistant to The Auditor General, United States Army Audit Agency, Alexandria, Virginia, 1996-1998; Commissioner, United States Army Court of Criminal Appeals, Falls Church, Virginia, 1994-1996; Defense Appellate Counsel, Defense Appellate Division, Falls Church, Virginia, 1993-94; Senior Trial Counsel, 32d Army Air Defense Command, Darmstadt, Germany, 1992-1993; Trial Counsel/ Legal Assistance Attorney, Babenhausen Legal Center, Babenhausen, Germany, 1990-1992. This thesis was submitted in partial completion of the Master of Laws requirements of the 47th Judge Advocate Officer Graduate Course.

THESIS ABSTRACT

The United States military is the only American jurisdiction that classifies and punishes nonviolent coercive sexual intercourse with a mentally and physically competent adult as rape. Instead of creating a separate offense to specifically address such sexual misconduct, Congress has left the military courts with a traditional common law rape statute that is ill suited for application to such situations. The military appellate courts have responded to the inaction of Congress by misapplying the "parental duress" theory of "constructive force" doctrine to the above-mentioned situations.

In so doing, however, the military courts have created a great deal of judicial confusion and general uncertainty as to what conduct actually constitutes the very serious crime of rape. This misapplication of the "parental duress" theory to situations involving fully competent adults who are not in fear of bodily harm has also opened the court house doors to prosecutorial overcharging, sentence disparity, and a possible constitutional challenge for vagueness. This thesis proposes a better solution. It proposes that Article 120, UCMJ, be amended to create the offense of "coercive sexual intercourse" in order to specifically address those situations in which an accused makes nonviolent use of his or her position of rank or authority to coerce a another person to submit to unwanted sexual intercourse.

By adopting the proposed revision, Congress could end the present confusion as to what actually constitutes the crime of rape, insulate Article 120 from a possible constitutional challenge, and help ensure that the nomenclature and maximum punishment for the crimes enumerated in Article 120 accurately reflect their differing natures and degrees of severity.

Table of Contents

I. Introduction

The United States military is the only American jurisdiction that classifies and punishes nonviolent coercive sexual intercourse with a mentally and physically competent adult as rape.[1] As the law stands today, a soldier, sailor, airman, or marine can receive a federal rape conviction at a court-martial for engaging in conduct that might not even qualify as quid pro quo sexual harassment in other jurisdictions.[2] So long as the victim's "passive acquiescence" to the act of sexual intercourse is prompted by the "unique situation of dominance and control" inherent in the service member's "superior rank and position," the service member may lawfully be convicted of rape under the UCMJ.[3] As such, the convicted service member is branded as a "rapist" and subjected to a possible maximum punishment of imprisonment for life.[4]

---

[1] The author's use of the expression "nonviolent coercive sexual intercourse" is intended to describe those situations in which one person causes another to engage in sexual intercourse through the use of express or implied threats of some type of harm other than that of bodily injury or death. In these circumstances the person being threatened could safely avoid engaging in intercourse, but instead acquiesces in order to avoid serious adverse action.

[2] *See* Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993) (noting that the reported cases "are replete with sex offenses that arose in a context that fits into the standard definitions of sexual harassment"). The Equal Opportunity Commission Guidelines define quid pro quo sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual . . .

29 C.F.R. § 1604.11(a) (1998).

[3] *See* United States v. Clark, 35 M.J. 432 (C.M.A. 1992) (affirming a non-violent rape conviction where the victim's "passive acquiescence" was "prompted by the unique situation of dominance and control presented by appellant's superior rank and position").

[4] Although Article 120(a), UCMJ, authorizes the imposition of the death penalty for the crime of rape, it is unlikely that a service member who is convicted of the nonviolent rape of an adult would be sentenced to death. 10 U.S.C.A. § 920 (West 1998). *See* Coker v. Georgia, 322 U.S. 585 (1977) (holding that the

Instead of creating a separate offense to specifically address such misconduct, Congress has left the military courts with a traditional common law rape statute, Article 120(a), UCMJ, that is ill suited for application to situations involving nonviolent coercive sexual relations between persons of different ranks or positions of authority.[5] Because Article 120(a) specifically requires "force" and "lack of consent," military appellate courts have resorted to an illogical extension of the traditional common law doctrine of "constructive force" in order to classify instances of nonviolent coercive sexual intercourse between competent adults as rape.[6]

In holdings and dicta, the military appellate courts have misapplied the "parental duress" theory of the "constructive force" doctrine to cases in which a mentally and physically competent adult victim reluctantly acquiesces to unwanted sexual intercourse. These courts have made use of the "parental duress' theory in these cases, even though the victim was never threatened with any bodily harm or injury. Although the military courts have so far limited their misapplication of the doctrine to cases in which grown children and adult trainees were coerced into engaging in undesired sexual intercourse by

---

imposition of the death penalty for the rape of an adult woman is unconstitutional). *Id* at 592. Furthermore, the Rules for Courts-Martial limit the authority of a court-martial to adjudge the death penalty to cases in which specifically enumerated aggravating conditions are present. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 1004 (1998) [hereinafter MCM].

[5] UCMJ art. 120 (West 1998). Article 120(a), UCMJ provides in pertinent part: "any person subject to this chapter who commits an act of sexual intercourse, *by force and without consent*, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct. *Id.* (emphasis added).

[6] *Id. See e.g., Clark,* 35 M.J. at 436

their parents or supervisors, the language of the opinions expresses a willingness to apply the doctrine to a much wider variety of cases.[7]

Through this misapplication of the "parental duress" theory of "constructive force" the military appellate courts have created a great deal of judicial confusion and general uncertainty as to what conduct actually constitutes the very serious crime of rape. This confusion and uncertainty has had a detrimental effect on the administration of military justice. It has also created problems of fair notice to offenders and opened the door to prosecutorial overcharging, equitable acquittals, and sentence disparity.

In an effort to end the aforementioned confusion and alleviate related problems, this thesis presents a proposed amendment to Article 120, UCMJ that would create the offense of "coercive sexual intercourse." The proposed offense would specifically prohibit service members from purposely causing another person to engage in unwanted sexual intercourse by threatening to take a serious nonviolent adverse action against that person or another person.

The proposed offense would specifically apply to situations in which a person subject to the UCMJ intentionally makes use of his or her superior rank or a similar position of authority to coerce another person into engaging in unwanted sexual intercourse. The statute would apply not only to situations in which the parties are of differing rank, but

[7] *See id.* (finding constructive force where an adult's passive acquiescence is prompted by the unique situation of dominance and control presented by the appellant's superior situation of dominance and control); United States v. Bradley, 28 M.J. 197, (C.M.A. 1989) (noting that explicit threats and a display of force unnecessary when there was a "unique situation of dominance and control" involving the "ancillary relationship between a military supervisor and the spouse of a soldier); United States v. Hartzog, No. ACM 29055, 1992 WL 329554, at *2 (A.F.C.M.R. November 9, 1992) (unpub.) (indicating a belief that the "parental duress" theory of "constructive force" can be extended "beyond [the] parent-child relationship" to apply to "other authority figures in a child's life").

also to any situation in which the service member is in a position of authority over the victim. As such, it would apply to situations in which a person in a position of authority, such as a parent, stepparent, investigator, drill instructor, recruiter, chaplain, or physician, uses his or her official position or authority to obtain sexual intercourse from a person subject to that position or authority. Although the offense of "coercive sexual intercourse" would be a felony, it would no longer carry the possibility of the death penalty or life in prison. Instead, it would carry a maximum sentence of confinement for 10 years.

This article is divided into seven sections with two appendices. Section II of the article contains an overview of Article 120, UCMJ (the military rape and carnal knowledge statute), as well as the current status of the "constructive force" doctrine in military jurisprudence. Section III briefly explores the historical development of rape as a military offense to illustrate how the military has codified and applied the common law of rape. Section IV examines the historical application of the "constructive force" doctrine in civilian and military jurisprudence to include the creation of the "parental duress" theory of "constructive force." Section V closely analyzes how the military appellate courts have misapplied the "parental duress" theory of the "constructive force" doctrine to cases involving mentally and physically competent adults who acquiesced to sexual intercourse even though they were never threatened with actual force. This section also examines some of the detrimental effects caused by this judicial misapplication of the "parental duress" doctrine. Section VI proposes an amendment to Article 120, UCMJ that would create the offense of "coercive sexual intercourse," expand the definition of "sexual intercourse," and properly limit the application of the

"constructive force" doctrine to situations in which an adult victim is either mentally incompetent or in fear of physical injury. Potential benefits of the new offense will be examined in this section as well as the potential interplay between the proposed offense and the existing offenses of rape and carnal knowledge. Section VII compares the proposed amendment to similar federal and state reforms in rape law. Section VIII concludes the article. Appendix A contains an sample of how Article 120, UCMJ would read with the inclusion of "coercive sexual intercourse" as an offense. Similarly, Appendix B contains an example of how paragraph 45 of the Manual for Courts Martial might be amended to explain the proposed offense and limit the application of the "constructive force" doctrine to situations in which a victim is either incompetent or in fear of bodily harm.[8]

II. Overview of Current Military Rape Statute and the Current Status of the "Constructive Force" Doctrine in Military Jurisprudence

The present version of Article 120, UCMJ, contains two somewhat related offenses involving unlawful vaginal intercourse.[9] Article 120(a), UCMJ contains the military rape statute, and Article 120(b), UCMJ contains the military prohibition against carnal knowledge, commonly referred to as "statutory rape" in civilian criminal courts.[10]

---

[8] MCM, *supra* note 4, pt. IV, ¶ 45 (containing an explanation of the offenses of rape and carnal knowledge).

[9] *See* UCMJ art. 120 (1998). Article 120 does not prohibit forcible anal intercourse or fellatio. Unlawful anal intercourse and fellatio, however, are specifically prohibited by Article 125. *See* UCMJ art. 125 (1998).

[10] *See* ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES, 57 (1956) (equating the military offense of carnal knowledge with "statutory rape").

Under Article 120(a), the offense of rape in the military is gender neutral as to both the victim and the offender.[11] Even though the majority of rape victims are female, it is now legally possible, though highly unlikely, for a court-martial to convict a female service member for the rape of a male.[12] As a practical matter, therefore, the gender neutrality of the offense is largely symbolic.[13] Similarly, because there is no spousal exception in Article 120 (a), a husband can be convicted of raping his wife and vice versa. [14]

Article 120 (a), UCMJ, as currently written, requires, that in order to be found guilty of the crime of rape, an accused must "commit an act of sexual intercourse, by force and without [the] consent" of the victim.[15] A plain reading of the statute would lead one to believe that if either actual force or a lack of consent were missing, the act of sexual intercourse would not amount to rape.[16] Such an interpretation is encouraged by some of the Manual provisions explaining the offense. For example, the Manual notes that the "[n]ature of the offense is "sexual intercourse by a person, executed by force and without

---

[11] The offense of rape was made gender neutral by the passage of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2506 (1992).

[12] Because Article 120(a), UCMJ applies only to vaginal penetration, it would seem difficult for a trial counsel to prove beyond a reasonable doubt that a male victim was forced to achieve an erection and thereafter engaged in vaginal intercourse against his will. *See* MCM, *supra* note 4, pt. IV, ¶ 45.

[13] *See* MODEL PENAL CODE § 213.1 commentary at 337-38 (Commentaries 1980) [hereinafter MODEL PENAL CODE] (noting that gender neutrality in rape statutes is largely symbolic and addressed to a hypothetical situation).

[14] The spousal exception was repealed by the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat 2315, 2506 (1992); *See* United States v. McDonald, No. NMCM 94 01041, 1995 WL 934974, at *4 (N.M.Ct.Crim.App. 28 Aug 1995) (unpub.) (finding that the conviction of a husband for the rape of his wife was legally sufficient).

[15] UCMJ art. 120(a) (1998).

[16] *Id.*

consent of the victim."[17] In the explanation of "[f]orce and lack of consent," the Manual stresses that "[f]orce and lack of consent are necessary to the offense."[18] The Manual goes on to state that [i]f the victim consents to the act, it is not rape."[19]

Although the military does not require that a rape victim "resist" her attacker, the military allows for the finder of fact to make certain inferences based upon a victim's failure to resist.[20] For example, if a victim fails to communicate her lack of consent "by taking such measures of resistance as are called for under the circumstances," a judge or panel may infer that the victim consented to the intercourse.[21] The fact finder, however, will not be permitted to infer that the victim consented to the intercourse if any of the following situations exist:

(1) the victim's "resistance would have been futile;"

(2) the victim's "resistance [was] overcome by threats of bodily harm;" or

(3) the victim was "unable to resist because of the lack of mental or physical facilities."[22]

---

[17] MCM, *supra* note 4, pt. IV, ¶ 45c(1)(b).

[18] *Id.*

[19] *Id.*

[20] *See* United States v. Watson, 31 M.J. 49, 52-53 (C.M.A. 1990). *See also* United States v. Frye, 33 M.J. 1075 (A.C.M.R. 1992). "There is no independent affirmative duty to resist on the part of the victim." *Id.* at 1078.

[21] MCM, *supra* note 4, pt. IV, ¶ 45c(1)(b).

[22] *Id.*

In those situations, military law presumes that there was a lack of consent, and recognizes that "the force involved in penetration will suffice" for a rape conviction.[23] Accordingly, military courts-martial have the authority to convict an accused of rape in certain situations in which there is little or no actual force and no manifestation of a lack of consent. Such convictions are accomplished through application of the "constructive force doctrine."[24]

In 1991, Judge Cox, the current Chief Judge of the Court of Appeals for the Armed Forces (CAAF) defined the doctrine of "constructive force" as follows:

> In the law of rape, various types of conduct are universally recognized as sufficient to constitute force. The most obvious type is that brute force which is used to overcome or prevent the victim's active resistance. Physical contact, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that constructive force has been applied, satisfying this element. Closely related to these is the situation in which the victim is incapable of consenting because she is asleep, unconscious, or lacks mental capacity to consent. In such circumstances, the force component is established by the penetration alone.[25]

---

[23] *Id.*

[24] *See e.g.*, United States v. Cauley, 45 M.J. 353 (1996) (implying that "constructive force" was present in the rape of an enlistee); United States v. Clark, 35 M.J. 432 (C.M.A. 1992) (applying "constructive force" doctrine based upon military rank of the accused and the subjective fear of the victim); United States v. Palmer, 33 M.J. 7 (C.M.A. 1991) (finding "constructive force" where child submits under compulsion of parental command); United States v. Hicks, 24 M.J. 3 (C.M.A. 1987) (finding of "constructive force" based upon the victim's "genuine fear of bodily harm); United States v. Rhea, No ACM 27563 (F REV) 1992 WL 110517 (A.F.C.M.R. May 11, 1992) (unpub.) (finding that "parental duress" constituted "constructive force" sufficient for the rape of an adult stepdaughter); United States v. DeJonge, 16 M.J. 974 (A.F.C.M.R. 1983) (holding that parental duress can constitute "constructive force" sufficient for the rape of a minor); United States v. Lewis, 6 M.J. 581 (A.C.M.R. 1978) (finding of "constructive force" based on an implied threat of bodily harm); United States v. Daniels, 12 C.M.R. 442 (A.B.R. 1953) (finding of "constructive force" in threats to harm the victim's infant child).

[25] *Palmer*, 33 M.J. at 9 (citations omitted), *quoted in Clark*, 35 M.J. at 437 (Sullivan, C.J. concurring). At the time that Judge Cox wrote the opinion in *Palmer*, Judge Sullivan was the Chief Judge of the United States Court of Military Appeals (COMA). Judge Cox is now the Chief Judge and the COMA has since been renamed as the United States Court of Appeals for the Armed Forces (CAAF). *See* National Defense

Accordingly, the Military Judges Benchbook contains eight separate instructions addressing common scenarios involving potential force and consent issues.[26] Of these eight scenarios, only one deals with "actual physical force."[27] The remaining seven all deal with issues of constructive force. Four deal specifically with "constructive force." These include "constructive force by intimidation or threats,"[28] constructive force by abuse of military power,[29] constructive force by parental or analogous compulsion, and the combination of constructive force by parental or analogous compulsion and a victim who is incapable of consent due to his or her young age. The remaining scenarios deal with situations in which "constructive force" may also be found to have been applied to

---

Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994). This act also changed the names of the intermediate military appellate courts. On 5 October, 1995 the individual service Courts of Military Review were renamed as the United States Army Court of Criminal Appeals, United States Air Force Court of Criminal Appeals, United States Navy-Marine Corps Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. *Id.*

[26] DEP'T OF ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, para. 3-45-1 (30 Sep 1996)[hereinafter BENCHBOOK]. An examination of the Benchbook provisions is helpful because it indicates what panel members are supposedly told about the relevant state of the law prior to their deliberations. Although the Benchbook instructions are not legal authority in and of themselves, they are persuasive because they are drafted by members of the trial judiciary using language from appellate decisions. *See id.* at the Foreword.

[27] *Id.* at para. 3-45-1. The Benchbook defines "actual force" as "the application of physical violence or power." *Id.*

[28] *Id.* The instruction on intimidation or threats states in pertinent part, "when the accused's (actions and words)(conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force. *Id.*

[29] *Id.* The instruction on abuse of military power states in pertinent part:

> There is evidence which, if believed, indicates that the accused (used) (abused) his (military) (____) (position) (and) (or) (rank) (and) (or) (authority) (____) in order to (coerce) (and) (or) (force) (state the name of the alleged victim) to have sexual intercourse. You may consider this evidence in deciding whether (state the name of the alleged victim) had a reasonable belief that death or great bodily harm would be inflicted on her and that (further) resistance would be futile.

Id.

victims who are incapable of giving consent due to age, mental infirmity, or other impairments such as sleep, unconsciousness, or intoxication.[30]

The tenor of the foregoing instructions clearly indicates military rape convictions are possible in a wide variety of situations in which little or no actual force has been applied and in which an adult victim acquiesces or submits, albeit reluctantly, to undesired intercourse. Accordingly, in the past few years, courts-martial have made use of the "constructive force doctrine" to convict an accused in each of the following situations:

(1). where a man engages in intercourse with his grown stepdaughter;[31]

(2). where a drill sergeant has sex with trainees;[32]

(3). where a man coerces his wife into having sex at a motel room;[33]

(4). where a recruiter has sex with a recruit;[34] and

(5). where a soldier impersonates a law enforcement officer and threatens to arrest a woman unless she grants his sexual desires.[35]

---

[30] *Id.*

[31] *See Rhea*, 1992 WL 110517 at *1 (involving 20 year-old victim); United States v. Sargent, 33 M.J. 815 (A.C.M.R. 1991) (involving 18 year-old victim).

[32] *See* United States v. Simpson, ARMY 9700775, *appeal pending.* (convicting SSG Simpson of raping numerous trainees under his supervision without resort to the threat of force).

[33] *See* United States v. McCreary, ACM 30753, 1995 WL 77637 (A.F.Ct.Crim.App. Feb 15, 1995) (finding the rape conviction legally sufficient even though no actual force used).

[34] *See* United States v. Cauley, 45 M.J. 353 (1996) (affirming the rape conviction of a Marine Corps recruiter, based in part on constructive force).

[35] *See* United States v. Frye, 33 M.J. 1075 (A.C.M.R. 1992) (indicating that the appellant could have been convicted of rape for impersonating a criminal investigator and threatening to arrest the victim).

Although the above-mentioned convictions have usually been upheld by the various military appellate courts, those courts have most often been unable to agree on the theory behind the finding of force. In some cases, they have found the existence of actual force. In others, they have found that the victim was in fear of death or bodily harm.[36] In the most disturbing cases, however, the appellate courts have misapplied the "parental duress" theory of "constructive force" to the relations between adults in order to sustain the conviction.[37] Consequently, it is now nearly impossible to determine the outer limits of what conduct will or will not suffice as the "constructive force" necessary for rape.

III. Historical Development of Rape as a Military Offense

This historical survey documents how the military justice system has progressed from an initial preference for the civilian prosecution of military rapists, to a limited ability to court-martial a military rapist only in time of war, to a willingness to prosecute military rapists under the UCMJ during peace and war, no matter where the rape occurs.

A. Initial Preference for Civilian Jurisdiction and Application of the Common Law of Rape

1. Early Articles of War

The American Articles of War of 1776 contained no specific prohibition against or jurisdiction over the common-law crime of rape.[38] Instead, these early Articles of War

---

[36] *See infra* Part IV.B.

[37] *See infra* Part V.

[38] American Articles of War of 1776, § X, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1494 (2d ed. 1896). The Articles of War of 1776 were actually the second codification of military law "for the regulating and well ordering" of the Army adopted by the Continental Congress. *Id.* at 22. Previously, Congress had adopted the Articles of War of 1775, which were based primarily upon the

expressed a clear mandate by Congress that civilian courts exercise jurisdiction over common law offenses such as rape.[39] Additionally, the Articles provided a severe penalty for officers who willfully neglected or refused to deliver such an accused soldier to the civil authorities.[40] For almost one hundred years after the enactment of the Articles of War of 1776, soldiers and sailors accused of committing a rape on American soil were tried in civilian, not military, courts.

2. Rape under Civilian Common Law

From the American Revolution to the Civil War, whenever a soldier, sailor, or marine was turned over to the civilian authorities for an alleged rape, he was most likely tried under the common law of the jurisdiction in which the offense was alleged to have

---

British Articles of War that were in effect at the time. *Id.* at 11. On 14 June 1776, Congress directed Thomas Jefferson and the other four members of the "committee on spies" to "revise the rules and articles of war." *Id.* at 12. Congress adopted this revision on 20 September 1776 as the Articles of War of 1776. *Id* at 13.

[39] *Id.* at 1494. The American Articles of War of 1776 required the following:

> Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the good people of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to trial.

Id.

[40] The Articles of War of 1776 also provided: If any commanding officer or officers shall willfully neglect or shall refuse, upon the application aforesaid, to deliver such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such shall be cashiered. *Id.*

occurred.[41] At common law, the offense of rape was defined as the "carnal knowledge of a woman by force and against her will" or "without her consent."[42]

Although this definition was adequate for the traditional "stranger in the bushes with a knife" type of rape, it was not well suited to coercive situations in which little or no violence was applied to gain the acquiescence of a mentally and physically competent victim.[43] Furthermore, because most American courts inherited from their English ancestors a deep-seeded suspicion of rape allegations, these courts were extremely reluctant to convict a man of rape in cases in which there was no evidence of actual violence.[44] Accordingly, most common law jurisdictions imposed evidentiary restrictions or "extra-elemental" factors that hindered the prosecution of non-violent rapists.[45]

---

[41] In such a court the indictment would have read something like this:

> On or about (a certain date) at or near (a certain place) (the named soldier or sailor) in and upon (the named victim) violently and feloniously did make an assault, and her the said (victim) then and there violently and against her will feloniously did ravish and carnally know her.

JOEL BISHOP, NEW CRIMINAL PROCEDURE OR NEW COMMENTARIES ON THE PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES 434 (1896) (quoting the typical common law form of an indictment for rape).

[42] *See* WM. L. BURDICK, THE LAW OF CRIME 221-22 (1946) (citing various early commentators such as Coke, Hale, Blackstone, Wharton, and Bishop).

[43] *See* Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1105-06 (1986) (noting "where a defendant threatens his victim with a deadly weapon, beats her, or threatens to hurt her, and then proceeds immediately to have sex, few courts have difficulty finding that force is present").

[44] *Id.* at 1094-95. The clearest example of this example of this long-standing suspicion is the cautionary jury instruction which was "traditionally given in rape cases" and which was based upon a famous quote by Lord Mathew Hale. *Id.* Lord Hale's famous quote proclaimed: "Rape is an accusation easily made and hard to be proved, and harder to be defended by a party accused, tho never so innocent." 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1778) *cited in* Estrich, *supra* note 43, at 1094.

[45] *See* Major Timothy Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A. F. L. REV 19, 20 (1996). According Major Murphy these "extra-elemental" factors included:

Because civilian courts were reluctant to convict a man of rape when there was an absence of violence, a service member who used a non-violent method of obtaining the acquiescence of a mentally and physically competent adult was unlikely to be convicted of the common-law crime of rape.

B. Recognition of Rape as a Military Offense

During the Civil War, Congress finally gave the military courts-martial jurisdiction over the offense of rape, but only when the offense was committed in time of war, insurrection, or rebellion.[46] Less than two months after the action of Congress, President Abraham Lincoln promulgated the first official American military criminal prohibition against rape.[47] In what is commonly referred to as the Lieber Code, President Lincoln proscribed the rape of an inhabitant of a country invaded by the United States and authorized the imposition of the death penalty for such an offense.[48] In fact, the Lieber

---

> 'utmost resistance' on the part of the victim, independent corroboration of the victim's testimony, cautionary instructions to the factfinder highlighting the difficulty in defending an allegation of rape, psychological testing for victim, or a heightened standard of review on appeal which focused upon the 'improbability' of the victim's testimony and the prosecution's evidence.

Id. (citing Cheryl Siskin, *No, The 'Resistance Not Required Statute' and 'Rape Shield Law' May Not Be Enough*, 66 TEMP. L. REV. 531 (1993).

[46] An Act for Enrolling and Calling out the National Forces, and for Other Purposes, Pub. L. No. 37-75, § 30, 12 Stat. 731, 736 (1863) (cited in JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 811 (1953)).

[47] Adjutant General's Office, Gen. Orders No. 100 (24 April 1863) *reprinted in* DIETRICH SHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 3 (1981).

[48] *Id.* This document is commonly known as the Lieber Code because Professor Francis Lieber of Columbia College in New York drafted it. *Id.* It also "represented the first attempt to codify the laws of war." *Id.* Accordingly, Article 44 of the Lieber Code provided in pertinent part:

> All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a

Code expressly authorized a superior officer to kill a military rapist "on the spot," if the superior caught him in the act of rape and the rapist thereafter disobeyed an order to desist.[49]

Following the Civil War, Congress explicitly made rape a military crime under the Articles of War of 1874, but again limited courts-martial jurisdiction to rapes that occurred during "time of war, insurrection, or rebellion."[50] The 1874 Articles of War contained neither a specific definition of rape nor any specific maximum penalty for the crime.[51] Congress was apparently content to rely on the common-law definition of the offense for the purposes of military prosecution.[52] The 1874 Articles provided only that the punishment for military offenders be no less severe than that of the civilian jurisdiction in which the rape was committed.[53]

> place by main force, *all rape*, wounding, maiming, or killing of such inhabitants, *are prohibited under penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.*

Id. at 10. (emphasis added).

[49] Article 44 of the Lieber Code further provided that "[a] soldier, officer or private, in the act of committing such violence [such as rape], and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior." *Id.*

[50] American Articles of War of 1874, art. 58, *reprinted in* WINTHROP, *supra* note 38, at 1529.

[51] *Id.*

[52] *See* WINTHROP, *supra* note 38, at 1040. In his 1896 treatise, Colonel Winthrop noted: "It is to be observed that as these crimes are not specifically defined in the Article, or elsewhere in the written military law, they are to be interpreted by the doctrines of the *common law*, each being viewed as the common-law offense of the same name." *Id.* at 1040.

[53] *Id.* at 1529.

By 1917, the military had both a specific statutory maximum punishment for the offense of rape and an official definition of the crime. Article 92 of the 1917 Articles of War provided that a "person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct."[54] Article 92, however, again contained a jurisdictional limitation in that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."[55] The 1917 Manual for Courts-Martial also specifically incorporated the common law definition of rape by defining rape as "the having of unlawful carnal knowledge of a woman by force and without her consent."[56]

Between 1917 and 1949, there were no major changes to the military rape statute. In fact, the only change to Article 92 during that time period involved the severing of that portion of the rape offense that pertained to a child under the age of ten and resulted in the creation of a separate carnal knowledge offense under Article 96.[57]

---

[54] Articles of War of 1917, art. 92, *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 442 (1917)[hereinafter 1917 MANUAL].

[55] *Id.*

[56] 1917 MANUAL, *supra* note 54 at ¶ 442. The elements of proof required for a rape conviction in 1917 were as follows:

> (a) That the accused had carnal knowledge of a certain female, as alleged; and
>
> (b) That the act was done by force and without her consent; or that the female was under the age of 10 years.

Id,

[57] By 1920, the Articles of War contained a separate carnal knowledge provision that dealt specifically with sexual intercourse involving a female under the age of consent. *See* Articles of War, art. 96, *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 1 at 213 (1928)[hereinafter 1928 MANUAL].

C. Modern Codification of Rape under the UCMJ

In 1950, the Uniform Code of Military Justice (UCMJ) replaced the Articles of War.[58] Under the UCMJ, the offenses of rape and carnal knowledge offenses were grouped together under Article 120. Although Article 120 now contained the separately defined crime of carnal knowledge, it retained the basic common law definition of the crime of rape.[59]

The only significant change to military rape law occasioned by the enactment of the UCMJ was the deletion of the jurisdictional limitations that had prevented the court-martial of a military rapist during time of peace and within the United States. Under the new UCMJ, military courts were specifically empowered to try rape cases during peace or war, at home or abroad.

From 1950 to the 1990s, Article 120 remained substantially unchanged. In 1992, Congress repealed the marital exception to the crime of rape and made the offense gender

---

[58] 10 U.S.C.A. §§ 801-940 (1950).

[59] Article 120, UCMJ defined the offenses of rape and carnal knowledge as follows:

> (a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.
>
> (b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished by death or such other punishment as a court-martial may direct.
>
> (c) Penetration, however slight, is sufficient to complete either of these offenses.

UCMJ art. 120 (1949).

neutral.[60] Thus, after 23 October 1992, it became possible for a husband, or a wife to be prosecuted for raping his or her spouse. Likewise, it became possible for a female to be convicted of raping a male.

In 1996, Congress made the offense of carnal knowledge gender neutral and recognized mistake of fact as to the victim's age as an affirmative defense to a prosecution for carnal knowledge.[61]

With the exception of a few minor changes, the rape statute that is used by the military services in 1999 to try soldiers, sailors, airmen, and marines is almost identical to the various common-laws statutes that were used to try soldiers and sailors during the time of the American Revolution. The only real difference between rape in 1776 and rape under the modern UCMJ stems from the judicial extension of the common law doctrine of "constructive force."

IV. Historical Development of the "Constructive Force" Doctrine

A. Development of the "Constructive Force" Doctrine by Civilian Courts

1. Traditional Application of the "Constructive Force" Doctrine by Civilian Courts

---

[60] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2506 (1992). Thereafter, Article 120(a), UCMJ read as follows: "Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." UCMJ art. 120 (1995).

[61] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462 (1996). In order to prevail on this affirmative defense, however, an accused must prove by a preponderance of the evidence that "the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve," and that "the accused reasonably believed that that person had at the time of the alleged offense had attained the age of sixteen." UCMJ art. 120 (1998).

Even though the civilian courts were generally unwilling to find that there was a rape in the absence of physical force, on occasion these courts were faced with an egregious situation in which a man had been able to obtain sexual intercourse without resorting to actual physical force.[62] Most often, such cases involved a victim who consented to sexual intercourse out of fear.[63] Sometimes they involved a victim who was of tender years[64] or an adult woman who was unable to either consent to the intercourse or resist the sexual advance because she was in some way mentally or physically incapacitated. [65]

---

[62] One famous commentator, divided these types of situations into the following categories:

(1) Acquiescence Obtained by Fear,

(2) Acquiescence Obtained by Ignorance of Nature of the Act,

(3) Acquiescence Obtained by Mistake or Imposition as to the Person, and

(4) Acquiescence Obtained by Artificial Stupefaction

FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW 583-586 (4th ed. 1857).

[63] *See e.g.* Shepard v. State, 33 So. 266 (Ala. 1903) (finding that "[t]he force necessary to be used to constitute the crime of rape need not be actual, but may be constructive or implied, and an acquiescence to the act obtained through duress or fear of personal violence is constructive force, and the consummation of unlawful intercourse by the man thus obtained is rape"); Pleasant v. State, 13 Ark. 360. (1853) (holding that when a "woman submits from terror, or the dread of greater violence, intimidation becomes equivalent to force"); Doyle v. Sate, 22 So. 272 (Fla. 1887) (holding that "[c]onsent of the woman from fear of personal violence is void, and though a man lays no hands on a woman, yet if by an array of physical force, he so overpowers her that she does not resist, his carnal intercourse with her is rape"); State v. Miller, 171 P. 524 (Wash. 1918) (finding force and lack of consent where victim was in fear of the 10 men who had taken her into the woods).

[64] *See e.g.,* Todd v. State, 103 S.E. 496 (Ga. App. 1920) (stating that at common law, "sexual intercourse with a child under the age of 10 years, whether had with or without her consent, stands upon the same footing as if had forcibly and against her will"); Stephen v. State, 11 Ga. 225 (Ga. 1852) (finding a non-rebuttable presumption of force when victim is under 10 years of age); Williams v. State, 47 Miss. 609 (Miss. 1873) (holding that rape is committed on a child of tender years, even if she actually consented, because such a child is deemed incapable of consent).

[65] *See e.g.,*Lewis v. Alabama, 30 Ala. 54 (1857).

> It is settled by a chain of adjudication, too long and unbroken to be now shaken, that force is a necessary ingredient in the crime of rape. The only relaxation of this rule is, the force may be constructive. Under this relaxation, it has been held, that where the female was an idiot, or had

Such mental incapacitation usually involved a victim who was mentally incompetent due to a mental defect or due to intoxicating drugs.[66] The physical incapacitation most often involved an unconscious or sleeping victim.[67]

Although the common law required that there be force and a lack of consent in order for there to be a rape, the courts were usually unwilling to let a man who engaged in the above conduct go unpunished. Therefore, the courts resorted to the "legal fiction" of constructive force in order to satisfy the element of force necessary for rape.[68] In these cases, the courts applied a sliding scale of required force depending upon the situation.[69] For example, if the court found that the victim was so frightened that she was rendered "insensible" or that she consented "under fear of death," there was no need for the

---

> been rendered insensible by the use of drugs or intoxicating drinks, and, in one case, where she was under the age of ten years, she was incapable of consenting, and the law implied force.

Id. at 56 (citations omitted).

[66] *See e.g.,* Iowa v. Tarr, 28 Iowa 397 (1870)(finding of rape based upon the imbecility of the female); Commonwealth v. Burke, 105 Mass 376 (1870) (finding rape where the victim insensible and incapable of consenting); Ohio v. Crow, 1 Ohio Dec 586 (1853) (holding that carnal knowledge of an insane or idiotic female constitutes rape).

See e.g., State v. Drombroski, 176 N. W. 985 (Minn. 1920)(holding that carnal intercourse with a female older than ten who is unable to consent "by reason of idiocy, imbecility or unsoundness of mind" is rape); Anschicks v. State, 6 Tex. App. 524 (1879) "A female over ten years of age, but who is still a child in stature, constitution, and physical and mental development may properly be adjudged incapable of consenting to sexual intercourse.

[67] *See e.g.,* Commonwealth v. Burke, 105 Mass. 376, (Mass. 1870) (involving an intoxicated victim); Payne v. State (Tex. Crim. App. 1899)(involving a sleeping victim).

[68] ROLLIN PERKINS, CRIMINAL LAW 121 (1957)[hereinafter PERKINS]. *See* BURDICK, *supra* note 42, at 230. "The force may be actual or constructive." *Id.*

[69] *Id.*

prosecution to show actual force.[70] "A consent induced by fear of personal violence is no consent; and, though a man lays not hands on a woman, yet, if by any array of physical force he so overpowers her mind that she dares not resist, he is guilty of rape by having the unlawful intercourse" [71] An actual "fear of death," however, was not necessary, so long as the victim "had good reason to consider resistance dangerous or absolutely useless."[72] Similarly, if the victim was mentally handicapped, intoxicated, unconscious, or under the age of consent, the force involved in the penetration itself was held to be sufficient to satisfy the force element of rape.[73]

2. Creation of the "Parental Duress" Theory of "Constructive Force"

Occasionally, civilian courts were faced with a father or stepfather who had engaged in sexual conduct with an unwilling daughter or stepdaughter who was neither an adult nor a child of tender years. In such cases the father had been able to coerce the young, but mentally and physically competent, victim into having sex without having to resort to violence or threats of violence. Accordingly, such an abusive father was not subject to the rape law because his despicable actions were outside the scope of the traditional application of the "constructive force" doctrine.[74]

---

[70] WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 168 (6 ed. 1861)

[71] 2 JOEL BISHOP, COMMENTARIES ON THE CRIMINAL LAW 594 (1868).

[72] JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW, 296 (1934).

[73] *Id.*

[74] *See e.g.*, Territory v. Potter, 25 P. 529 (Ariz. 1883) (overturning rape conviction of a father who repeatedly had sexual intercourse with his 12 year-old daughter). Although the Arizona Supreme Court could "scarcely imagine a more horrible case on the part of one calling himself 'father,'" the court felt constrained by the letter of the law of rape. *Id.* at 530.

Most courts were unwilling to allow such a result. Because a father was considered to be an exceptionally strong authority figure, the courts created and applied the "parental duress" theory of "constructive force" in such cases to find that there had been a rape in such cases upon a finding that the child acquiesced under fear of that authority.[75] By doing so, the courts created a very narrow class of "rape" cases in which the familial status of the parties became more of an issue than the traditional elements of "force or lack of consent." As long as this special familial relationship existed, the parent could be convicted of raping his minor child or stepchild even though there was consent and even though he never implicitly or explicitly threatened the child with harm.

3. Limits on the Application of the "Constructive Force" Doctrine

Although the civilian courts were willing to extend the constructive force doctrine to protect minors from inter-familial sexual abuse by a parent, they were generally unwilling to extend the "constructive force" doctrine to situations in which a physically and mentally competent adult woman was coerced into undesired sex through the use of non-violent means. For example, courts refused to find that there had been a rape where

---

[75] *See e.g.,* State v. Etheridge, 352 S.E.2d 673 (N.C. 1987). Although the North Carolina Supreme Court was not the first to adopt the "parental duress" theory of rape, it provided an eloquent explanation of rationale for the theory:

> Sexual Activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse. The Youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays are not necessary.
>
> . . . .
>
> . . . In such cases the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces. Coercion, as stated above, is a form of constructive force

Id. at 681.

a man obtained sex by threatening to force a woman to walk home.[76] The same result occurred where a man impersonated a policeman and obtained sex by threatening to arrest his victim.[77] Likewise a man who physically threatened and immediately thereafter promised to marry a young lady was found not to have committed rape.[78] Similarly, explicit threats made after the sexual intercourse in order to discourage the woman from disclosing the incident were found not to constitute "constructive force."[79]

As the United States Supreme Court stated in the seminal rape case of *United States v. Mills*:

> [I]n the ordinary case where the woman is awake, of mature years, of sound mind, and not in fear, a failure to oppose the carnal act is consent; and though she object verbally, if she make no outcry and no resistance, she, by her conduct, consents, and the act is not rape in the man. [80]

B. Adoption of the "Constructive Force" Doctrine by Military Courts

1. Adoption of the Traditional "Constructive Force" Doctrine

It is unclear exactly when the military adopted the doctrine of "constructive force." However, it appears that the military began using the underlying concepts of the doctrine

---

[76] *See* Montoya v. State, 185 S. W. 6 (Tex. Cr. App 1920)(holding that explicit threat to abandon a woman 4-5 miles from her destination does not constitute the requisite threat of bodily harm).

[77] *See e.g.,* People v. Cavanaugh, 158 P. 1053 (Cal. App. 1916)(holding that submission based on fear of arrest was fatal to a rape charge). *See also,* BURDICK, *supra* note 42, at 233.

[78] Wade v. State, 138 S. E. 921, 922 (Ga. App. 1927) (overturning rape conviction even though the victim had been threatened with force because the victim finally consented to the intercourse in anticipation of marriage).

[79] *See* BURDICK, *supra* note 42, at 233.

[80] United States v. Mills, 164 U.S. 644, 648 (1897).

sometime after the adoption of the 1874 Articles of War. Although Colonel William Winthrop did not specifically refer to the term "constructive force" in his 1896 treatise on military law, his explanation of military rape law indicated that the military followed the doctrine.[81] For example, Colonel Winthrop noted that the "force implied in the term 'rape' may be of any sort, if sufficient to overcome resistance."[82] In Colonel Winthrop's learned opinion, the requisite force could "be exerted in part or entirely by means of other form of duress, or by threats of killing or of grievous bodily harm or other injury, or by any moral compulsion."[83] Additionally, he stated that a "less[er] degree of force or intimidation will ordinarily be required to be shown where the female is of tender age, in feeble health, or imbecile, than where she is mature, strong, and intelligent."[84]

a. Constructive Force Doctrine in the Manual for Courts-Martial

The first official military publication of the term "constructive" in relation to the force element of rape was found in the 1917 Manual for Courts-Martial (1917 Manual).[85] The 1917 Manual provided that "[f]orce, actual or constructive, and a want of consent are indispensable in rape, but the force involved in the act of penetration is alone sufficient

[81] *See* WINTHROP, *supra* note 38, at 1050. It is interesting to note that Colonel Winthrop cited to no military cases in his discussion of constructive force. *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] 1917 MANUAL, *supra* note 54, at ¶ 442.

force where there is in fact no consent"[86] However, the 1917 Manual failed to define either "force" or "constructive force."[87]

Instead, the 1917 Manual focused primarily on the manner in which the lack of consent of the victim might be proved.[88] The 1917 Manual explained that there can be no consent where a woman is "insensible, unconscious, or asleep, or where her apparent consent was extorted by violence to her person or fear of sudden violence."[89] The 1917 Manual noted, however, that a court martial may conclude or infer that there was consent "where the woman fails to take such measures to frustrate the execution of the man's design as she is able and are called for under the circumstances."[90] The1917 Manual further explained that "mere verbal protestations and a pretense of resistance do not, of course, show a want of consent."[91] Additionally, like many other American jurisdictions, the 1917 Manual cautioned that rape accusations are easy to make and extremely hard to defend.[92]

---

[86] *Id.* (emphasis added).

[87] *Id.*

[88] *See id.*

[89] *Id.* The 1917 Manual presumed that a child under the age of 10 was incapable of consenting to sexual intercourse. *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id. See also* Estrich, *supra* note 44, at 1094-95 (citing Lord Matthew Hale's cautionary rape instructions).

Within three years, however, the specific reference to "constructive" force had been inexplicably deleted from the Manual for Courts-Martial explanation of rape.[93] Although the 1920 Manual for Courts-Martial (1920 Manual) failed to specifically mention "constructive" force, it did retain most of the 1917 Manual comments related to constructive force to include the provision that "the force involved in the act of penetration is alone sufficient force where there is in fact no consent.[94] Likewise, the 1920 Manual retained the provisions concerning victims who are "insensible, unconscious, or asleep" or whose "apparent consent was extorted by violence" or "fear of sudden violence."[95] Thereafter, the 1928 and 1949 Manuals for Courts-Martial also retained the notion that penetration alone will suffice as force in cases of no consent.[96]

In 1951, the President promulgated the first Manual for Courts-Martial based upon the Uniform Code of Military Justice.[97] The 1951 Manual for Courts-Martial retained much of the language of the 1917, 1928, and 1949 Manuals regarding the crime of rape.[98] This is not surprising, however, considering that the UCMJ adopted the common law definition of the crime of rape that had been used in the Articles of War.[99]

---

[93] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 442 (1920)[hereinafter 1920 MANUAL].

[94] *Id.*

[95] *Id.*

[96] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 148 (1928)[hereinafter 1928 MANUAL]; MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 179 (1949)[hereinafter 1949 MANUAL]. These two manuals, however, made no mention of "insensible, unconscious, or asleep" victims or those who consent out of extortion or fear. *Id*

[97] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951)[hereinafter 1951 MANUAL].

[98] *Id.* at ¶ 199a.

[99] 10 U.S.C.A § 920 (1950).

The 1951 Manual retained the system of inferences that served to focus rape trials upon the conduct of the victim, rather than that of the accused.[100] The 1951 Manual added that "[a]ll the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist *only because of a reasonable fear of death or grievous bodily harm.*"[101] The 1951 Manual, also specifically retained the requirement that a victim's resistance involve more than "mere verbal protestations."[102]

b. Constructive Force Doctrine in Military Case Law

Two years after the publication of the 1951 Manual, a military appellate judge first used the term "constructive force" in a published military opinion.[103] In *United States v. Kernan*, a case that was actually overturned on a finding of factual sufficiency, Judge Anderson noted that the "constructive force" doctrine could be applied in situations where a woman submits to intercourse with "no resistance because of conduct on the part of the accused calculated to put her in fear of death or great bodily harm."[104] In such

---

[100] *See* 1951 MANUAL, *supra* note 97 at ¶ 199a.

[101] *Id.* (emphasis added).

[102] *Id.*

[103] United States v. Kernan, 11 C.M.R. 314, 321 (A.B.R. 1953).(Anderson, J. dissenting).

[104] *Id.* at 321. The individual military intermediate appellate courts, unlike civilian appellate courts, have the authority to overturn the factual findings of a trial court. *See* 10 U.S.C.A. § 866. Article 66(c), UCMJ provides that an intermediate military appellate court:

> may affirm such findings of guilty and the sentence or part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

cases, Judge Anderson argued, the accused's calculated "threatening conduct" is the means of effecting the act of sexual intercourse without the consent of the prosecutrix and is sufficient to constitute the crime of rape.[105]

Soon thereafter, in *United States v. Daniels,* the Army Board of Review affirmed a rape conviction based on the "constructive force" doctrine.[106] In *Daniels*, the Army Board specifically rejected the defense argument that in order for threats to "amount to constructive force" they "must be of serious bodily injury to the victim of the rape herself."[107] The Army Board found that threats of bodily injury against a mother's newborn could constitute the "constructive force" necessary for a rape.[108]

Thereafter, the military appellate courts did not mention the concept of "constructive force" during the next quarter of a century. In the 1978 case of *United States v. Lewis*, the United States Army Court of Military Review revisited the concept of "constructive force" in a case involving the rape of a sixteen-year-old German girl in which minimal force and implied threats were used by the perpetrators.[109] In that case, the Army Court

---

Id. Accordingly, a military intermediate appellate court has the power to overturn a "legally sufficient" case based upon a finding of "factual insufficiency." *Id.*

[105] *Kernan*, 11 C.M.R. at 321.

[106] United States v. Daniels, 12 C.M.R. 442, 446 (A.B.R. 1953).

[107] *Id.* at 445-46.

[108] *Id.* at 446. The board stated that "the mother may have been impelled by subjective fear to submit against her will to such acts even if such submission was more for the purpose of protecting her child than for the purpose of saving herself." *Id.* Accordingly, the board unanimously upheld the rape conviction of Corporal Daniels even though the threats were actually made by one of his accomplices. *Id.* at 447.

[109] United States v. Lewis, 6 M.J. 581 (1978). The victim in Lewis was coaxed into a jeep with the three soldiers late at night under the pretext of receiving a ride home to her village. *Id.* at 582. When one of the

of Military Review specifically found that "although the actual force applied was minimal, there was effective constructive force" due to the "three to one male to female ratio, the presence of lethal weapons, the state of close confinement in the jeep and the desolate and despairing wooded scene."[110] Under the circumstances of this case, the Army court found that the aforementioned factors created implied threats of bodily harm that made it reasonable for the young victim to "fear for her life" and to "conclude that to offer no physical resistance was her best course of action."[111]

The Court of Military Appeals (COMA) first addressed the issue of constructive force in the case of *United States v. Hicks.*[112] The *Hicks* case involved a Marine Corps section leader who was convicted of extortion and rape for coercing the girlfriend of one of the privates in his section into engaging in sexual intercourse.[113] The incident arose out the appellant's discovery of the victim's unauthorized presence in the barracks room of her boyfriend. Upon his discovery, the appellant suggested that the private hide the victim in

---

soldiers tried to kiss her she resisted by using her elbow and feigning pregnancy. *Id.* As the soldiers drove past her village and into the woods, the victim repeatedly requested in English to be let out and let go. *Id.* at 582-83. In Lewis, the actual force consisted of one of the soldiers forcing the victim out of the jeep, pushing her to the ground on to a field jacket, and removed her clothing. *Id.* at 582. In a footnote, the Army Court noted that "to require that a woman sacrifice her virtue not only would represent a misplaced sense of values but would also unjustly raise an inference and an eyebrow whenever a raped woman lived to tell the tale." *Id.* at 584 n.1 (quoting *Note, the Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 685 (1966).

[110] *Lewis*, 6 M.J. at 583.

[111] *Id.*

[112] United States v. Hicks, 24 M.J. 3 (C.M.A. 1987).

[113] *Id.* at 5.

the appellant's room.[114] Thereafter, the appellant approached the 20 year-old victim when she was alone in his room, told her that her boyfriend "would probably get thrown in the brig," and offered to "get [her boyfriend] out of trouble" in exchange for sexual relations with her.[115] When the victim failed to respond to his coercive offer, the appellant told her, "[it] doesn't matter if you cooperate or not, I'm going to give it to you anyway."[116] Because the victim "was scared," she remained still as the appellant undressed her and had his way with her.[117]

The COMA found that the appellant's initial attempts at obtaining intercourse by threatening to harm the career of the victim's boyfriend were legally sufficient to constitute extortion under Article 127, UCMJ. The court then cited to the Army Court of Military Review's holding in *Lewis* for the traditional common law proposition that "constructive force may consist of expressed or implied threats of bodily harm."[118] The COMA noted that the trial judge had "obviously concluded that the appellant's acts were sufficient to reasonably create in the victim's mind—having regard for the circumstances in which she was placed, and her age, size, and mental condition—a genuine fear of

---

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* The victim testified that she thought about kicking the appellant and running away, but did not do so because she was all-alone and did not have anywhere to go to get away from the accused. *Id.*

[118] *Id.* at 6. *See* 10 U.S.C.A. § 927 (1998)(containing the military extortion statute).

bodily harm."[119] Accordingly, the court specifically adopted the traditional "constructive force" doctrine and affirmed the rape conviction.[120]

2. Adoption of the "Parental Duress" Theory of "Constructive Force"

The Air Force Court of Military Review was the first military appellate court to adopt the "parental duress" theory of "constructive force" from civilian law. In *United States v. DeJonge*, the Air Force court was faced with a case in which an Air Force master sergeant had engaged in the long term, but non-violent, sexual abuse of his minor natural daughter.[121] Although the minor victim was neither in fear of bodily harm nor was she mentally or physically incapacitated, the court saw fit to apply the doctrine of "constructive force" to find that the father had "used force in the nature of parental coercion" to have sexual intercourse with his daughter.[122]

The Air Force court cited to civilian cases and held that "there is constructive force where the sexual intercourse is accomplished under the compulsion of long continued parental duress."[123] Accordingly, the Air Force court expressed no reservations in adopting the "parental duress" theory of "constructive force" to cover the sexual

---

[119] *Hicks*, 24 M.J. at 6.

[120] *Id.* at 6-7.

[121] DeJonge, 16 M.J. at 974.

[122] *Id.* at 976.

[123] *Id.*

intercourse which began when the victim was 11 years old and continued until she was well beyond her 17th birthday.[124]

In *United States v. Ortiz*, the Navy-Marine Corps Court of Military Review applied the "parental duress" theory of "constructive force" to the stepparent/stepchild relationship.[125] Because the case arose from a guilty plea, the Navy-Marine Corps Court based its decision to affirm the rape conviction on the appellant's own sworn testimony. The court noted that the appellant admitted that he had placed "subtle pressures" on his 17-year-old stepdaughter to get her to consent to sexual intercourse by threatening to withhold certain favors and privileges from her.[126] According to the court, these favors and privileges consisted of "staying out late, borrowing the car, going to the beach, and seeing her boyfriend."[127] Curiously, the court found it most significant that the "appellant [had] described his long-continued parental duress as being 'force and lack of consent' as that term is understood in military law."[128] Although the court affirmed the conviction under the "parental duress" theory of "constructive force," the court was careful to note that the "factual predicate" in *Ortiz* would "not establish the element of force and lack of consent if the perpetrator and victim had been strangers."[129]

---

[124] *Id.*

[125] United States v. Ortiz, 25 M.J. 840 (A.F.C.M.R. 1987)

[126] *Id.* at 842. The court noted that the appellant admitted that his stepdaughter had "' no choice' but to have sexual intercourse with him if she wanted to enjoy these privileges." *Id.*

[127] *Id.*

[128] *Id.* at 842-43.

[129] *Id.* at 842.

In 1991, in the case of *United States v. Palmer*, the COMA first addressed the "parental duress" theory of "constructive force."[130] In reviewing the appellant's conviction for the rape of his 12-year-old stepdaughter, the court provided an explanation of the "parental duress" theory or "species of 'constructive force.'"[131] Judge Cox, writing for a unanimous court, first noted that civilian jurisdictions "have explicitly recognized that a parent or other authority figure can exert 'a moral, psychological or intellectual force' over a child which is the compulsory equivalent of a threat or intimidation."[132] Judge Cox then cited to, and agreed with, the "oft-quoted opinion" of Justice Martin of the North Carolina Supreme Court that "[t]he youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a *unique situation of dominance and control* in which explicit threats and displays of force are not necessary to effect the abuser's purpose."[133] Although Judge Cox cautioned that not all children "invariably acquiesce to parental will," he held that the "compulsion of parental command" can "establish that the child was forced and that consent was lacking."[134] Thereafter, the Court of Military Appeals allowed the appellant's rape conviction to stand.[135]

---

[130] *Palmer*, 33 M.J at 7.

[131] *Id* at 9.

[132] *Id.* (citing Commonwealth v. Ruppert, 579 A.2d 966, 968-69 (Pa. 1990)).

[133] *Id.* (citing *Etheridge*, 352 S.E. 2d at 681 (emphasis added)). The emphasized portions of Justice Martin's opinion are of critical importance because they are later applied by COMA to a "constructive force" situation involving two adult soldiers. *See Clark*, 35 M.J. at 436.

[134] *Palmer*, 33 M.J. at 10.

[135] *Id.* at 11.

V. Misapplication of the "Parental Duress" Theory of the "Constructive Force" Doctrine by Military Appellate Courts

By 1991, the COMA and its subordinate courts had adopted both the traditional common law doctrine of "constructive force" and the somewhat newer "parental duress" theory of "constructive force." The military appellate courts, however, were not content to limit the "constructive force" doctrine to cases in which the victim was either a child, an incompetent, or afraid of bodily harm. In dicta and in decisions, the Court of Military Appeals and some of the lower military courts expressed a willingness to further expand the "parental duress" theory of "constructive force" until it was finally misapplied to non-violent coercive sexual intercourse with a mentally and physically competent adult who was not subject to parental duress.

A. Misapplication of the "Parental Duress" Theory to Adult Victims

The Army Court of Military Review was the first military appellate court to extend the "parental duress" theory of "constructive force" to a case involving a mentally and physically competent adult victim who had not been threatened with physical force.[136] In *United States v. Sargent*, the Army Court of Military Review affirmed the appellant's conviction for the non-violent rape of his stepdaughter, even though she was 18 years old at the time of the sexual intercourse.[137] Furthermore, the stepdaughter was already married to another soldier and had previously given birth to a child.[138] Although she initially refused the appellant's sexual advances by saying "no," she testified that she did

---

[136] *Sargent*, 33 M.J. at 815.

[137] *Id.* at 818.

[138] *Id.*

not physically resist the appellant because she was afraid of him.[139] The Army court noted that military trial judge had "obviously concluded that the appellant's acts were sufficient to reasonably create in the victim's mind . . . [a] genuine fear of bodily harm."[140] The Army court agreed with the military judge, but offered a somewhat confusing explanation of its rationale. The Army court specifically found that the young woman's fear of her stepfather was "reasonable" because he had previously sexually abused her, he had hit her two years prior to the rape, and she had seen him strike her mother in the past.[141] Furthermore, the court noted that the "most significant" factor in assessing the reasonableness of her fear was the fact that the she had once before been placed in a foster home and prevented from seeing her mother and siblings after reporting prior sexual abuse by the appellant.[142] Although the Army court found that the existence of these factors made it "apparent that resistance would [have] result in physical abuse," the court failed to explain their rationale.[143]

In *United States v. Rhea*, the Air Force Court of Military Review misapplied the "parental duress" theory to the rape of a fully competent 20-year-old stepchild.[144] The adult stepdaughter in *Rhea* had voluntarily traveled to Germany to live with the appellant,

---

[139] *Id.* at 816.

[140] *Id.*

[141] *Id.* The victim also testified that she thought the appellant was "crazy" because he "got mad" when he drank. *Id.* However, there was no evidence "that the appellant had been drinking" during the incidents. *Id.*

[142] *Id.* at 818.

[143] *Id.*

[144] *Rhea*, 1992 WL 110517, at *3 (unpub). Although the stepdaughter was not suffering from a mental disease or defect, there was testimony at trial from a clinical psychologist that she was not "psychologically capable of physically resisting her stepfather's advances." *Id.* at *4.

her stepfather, as he was divorcing her mother.[145] She moved in with the appellant, even though he had sexually abused her in the past.[146] At trial, she testified that "she did not want to have sexual relations with her stepfather, but his constant begging and pleading had wore her down."[147] She also testified that her stepfather promised to buy a stereo for her if she engaged in sexual intercourse with him on six occasions.[148]

In finding that the stepfather's "parental duress" provided the coercion necessary to constitute "constructive force" sufficient for the rape of a 20-year-old woman, the Air Force court focused on the following factors:

(1) The appellant had sexually abused the victim since she was thirteen years old;

(2) The appellant had subjected the victim to a sexual "grooming process;"

(3) The victim was emotionally and financially dependent on the appellant; and

(4) The appellant had previously promised he would stop abusing her if she came to live with him in Germany.[149]

Unlike the *Sargent* case, there was no evidence in this case that the stepfather had ever implicitly threatened to harm his stepdaughter or that she was in any way afraid of

---

[145] *Id.* at *1. The court reasoned that the 20 year-old "chose not to live with her mother in Florida" because she "was emotionally and financially dependent" on the appellant and had previously been "groomed" to obey his carnal requests. *Id.* at

[146] *Id.*

[147] *Id.* at *3.

[148] *Id.* at *1. She kept track of each of the six occasions or "lovings" on a calendar that was later introduced at trial against the appellant. *Id.*

[149] *Id.*

him.[150] Nonetheless, the Air Force court allowed the rape conviction to stand, albeit in an unpublished decision.[151]

In another unreported case, *United States v. Hartzog*, the Air Force Court of Military Review indicated a further willingness to apply the "parental duress" theory beyond the traditional parent or stepparent relationship.[152] Although *Hartzog* was a sodomy case, the Air Force court applied the "parental duress" theory by analogy to uphold the appellant's conviction for forcibly sodomizing his nine-year-old niece.[153] In dicta, the Air Force court stated that it believed that the "parental duress" theory "applies to other authority figures in a child's life, such as an uncle, regular baby-sitter, teacher, coach, or scoutmaster."[154] Accordingly, an airman could be convicted of the extremely serious felony of rape for making non-violent use of his position as a coach or a scoutmaster to coerce a person under the age of eighteen into engaging in sexual intercourse.

B. Misapplication of the "Parental Duress" Theory to Disparity in Rank

In *United States v. Bradley*, the COMA began the process of misapplying the doctrine of "constructive force" to situations in which a fully competent adult victim acquiesces to

---

[150] *See Sargent*, 33 M.J. at 816.

[151] In reaching its decision, the Air Force Court of Military Review relied on language purportedly found in State v. Colestock, 67 P. 418 (Or. 1902). *See Rhea*, 1992 WL 110517, at *4. The *Colestock* case, however, contains no such language. *Colestock*, 67 P. at 418. More importantly, *Colestock* involved a 19-year-old victim who was forcibly ravished in the dark by a non-relative and whose cry for help was heard by a witness 25 feet away. *Id.* at 419.

[152] Hartzog, 1992 WL 329554 , at *1.

[153] *Id* at *2.

[154] *Id.*

the non-violent sexual demands of person based upon a disparity in rank or position.[155] The factual scenario in *Bradley* was reminiscent of the facts in *United States v. Hicks*.[156] The appellant in *Bradley* was an unscrupulous drill sergeant who obtained sex from the youthful bride of one of his new recruits by threatening to imprison her husband for three years if she did not comply with his sexual desires.[157] Like *Hicks*, the appellant in *Bradley* had been convicted of both rape and extortion.[158]

In its review of the case, the COMA first noted that the appellant never expressly threatened to harm the victim or applied any actual force other than that required to affect penetration.[159] The court, however, stated that the "court members were not limited to evidence of the direct application of force or express demonstration of 'constructive' force in determining whether the appellant raped the victim."[160]

The court then digressed from its discussion of the traditional application of the "constructive force" doctrine by focusing on the appellant's status as a drill sergeant.[161] The court actually held that the "military relationship [between the appellant and the

---

[155] Bradley, 28 M.J. at 197.

[156] *Id.* at 200. S*ee Hicks*, 24 M.J. at 3.

[157] *Bradley*, 28 M.J. at 200. The appellant approached the victim at night when she was alone in her trailer. *Id.* He then showed her a completed DA Form 2627-1, Record of Summarized Proceedings Under The UCMJ that indicated the victim's husband had violated lawful orders by driving a vehicle during basic training. *Id.*

[158] *Id.* at 198.

[159] *Id.* at 200. The court noted that the appellant did "physically place his hands on the victim's shirt after she [had] removed his hands therefrom." *Id.*

[160] *Id.*

[161] *Id.* "The evidence presented in this case shows that the alleged victim was the youthful bride of a recent military recruit who himself was under the direct supervision of the appellant." *Id.*

recruit] with its ancillary implications for the dependent spouse created a *unique situation of dominance and control* where *explicit threats of force* by the military superior were *not necessary*."[162] In support of this holding, the court cited to two cases, both of which involved the application of the "parental duress" theory of "constructive force" to victims who were under the age of twelve.[163] The Court of Military Appeals was trying to draw a parallel between the relationship of a father to his minor child and the relationship of a military superior to the adult spouse of one of his soldiers. However, the court must have realized the weakness in this analogy, because it stopped short of actually finding that this relationship alone warranted the application of the "constructive force" doctrine.

Instead, the court looked at other factors in the case, and concluded the situation was "highly coercive" and that there was "sufficient evidence of an implied threat of death or bodily harm to meet the requirements of Article 120."[164] These factors included the fact that the victim was alone in her secluded trailer, the appellant was acting bizarre, and he "made clear his determination to accomplish his salacious demands."[165]

The COMA also stressed that the appellant "directly exploited his imposing status as a drill instructor" by "employing language indicating his power and control."[166]

---

[162] *Id.* (emphasis added) (using language from, and citing to *Etheridge*, 352 S.E. at 681. The COMA does not mention that the quoted language comes from a case that was specifically grounded upon the "youth and vulnerability of children." *Id.*

[163] *Bradley*, 28 M.J. at 200 (citing to State v. Eskridge, 38 Ohio St. 3d 56 (1988); *Etheridge*, 352 S.E. at 673). These cases are not on point as they dealt with the rape of a four-year-old girl by her father and the forcible sodomy of an eleven-year-old boy by his father. *Id.*

[164] *Bradley*, 28 M.J. at 200. It is interesting to note that a civilian court had tried the appellant for the same incident. The civilian rape trial, however, resulted in a hung jury. *Id* at 199.

[165] *Id.* at 200.

[166] *Id.*

Interestingly though, the court made no attempt to explain how the appellant's status as her husband's drill instructor caused the victim to be more fearful of bodily harm than she would have been had the appellant been a more junior soldier. Instead, the *Bradley* court merely noted that it is "required to view the evidence in the light most favorable to the Government," and that under such a standard the court would "construe [the appellant's] conduct more broadly."[167]

At any rate, the Court of Military Appeals' discussion of this rank based "unique situation" led to confusion among military practitioners. For example, soon after the decision in *Bradley* was published, Acting The Judge Advocate General of the Army requested review of the Army Court of Military Review's decision to set aside the rape conviction in *United States v. Bonnano-Torres*.[168] The *Bonnano-Torres* case involved a staff sergeant who had engaged in unwelcome sexual intercourse with an intoxicated and sleepy finance specialist who was subject to his supervision while they were on temporary duty.[169] The victim in *Bonnano-Torres* testified at trial that she reluctantly permitted her supervisor to engage in sexual intercourse with her at her hotel room, only because she wanted him to leave her alone so she "could go to sleep."[170] As she stated at

---

[167] *Id.* at n. 1.

[168] United States v. Bonnano-Torres, 31 M.J. 175, 176 (C.M.A. 1990).

[169] United States v. Bonnano-Torres, 29 M.J. 845 (A.C.M.R. 1989). Although the Army court's opinion was decided after *Bradley* was published, it makes no mention of the *Bradley* case. *Id. See Bradley*, 18 M.J. at 197.

[170] *Bonnano-Torres,* 31 M.J. at 176.

trial, "I knew he'd leave me alone once he had sex with me and I knew that he wouldn't leave me alone until he did."[171]

Although there was a clear supervisory relationship and a disparity in rank between the appellant and his victim, the COMA ignored these relationship-based factors completely. Instead of relying on its "parental duress" dicta in *Bradley*, to find that there was some type of "constructive force" inherent in the relationship between the staff sergeant and the specialist, the COMA simply affirmed the Army court's holding that there was no "constructive force" in the case.[172] The COMA based its decision on the Army Court's findings that the victim, "was both physically and psychologically capable of resisting the accused's sexual advances," that the accused "did not use threats of bodily harm," and circumstances were not "such that resistance would be futile."[173] The Court of Military Appeals went on to proclaim that "where there is no constructive force and the alleged victim is fully capable of resisting or manifesting her non-consent, more than the incidental force involved in penetration is required for conviction."[174]

The following year, in *United States v. Clark*, the Army Court of Military Review once again examined the applicability of the "constructive force" doctrine in the workplace environment.[175] The court did so in the case of a sergeant first class mess hall supervisor who had been convicted of "raping" a trainee in the rank of private who had

---

[171] *Id.*

[172] *Id.* at 180.

[173] *Id.* (citing to *Bradley*, 28 M.J. 197).

[174] *Id.* 179-80.

[175] *Clark*, 32 M.J at 606.

been assigned to kitchen police (KP) duty in the mess hall.[176] The trainee testified that she was "scared" of the appellant and thought that he "was weird" from the first time she met him.[177] While the trainee was on KP duty, the appellant ordered her to "accompany him to a storage shed" which was "out of view of anyone in the training unit."[178] Once they were in the darkened shed, the appellant "grabbed" the trainee's arm and "kissed her."[179] He then told her to take off her trousers.[180] She responded by "unbuttoning only the top two buttons, hoping that he would be unable to get her trousers down and would stop."[181] Unfortunately, the appellant was able to pull down her pants and unsuccessfully attempted intercourse with her.[182] After this initial failure, he "ordered her to turn around and bend over." [183] He then successfully "penetrated her vagina" and grabbed one of her breasts.[184] While they were engaging in intercourse, she "for the first time, verbally told the appellant to stop by stating, 'someone may come.'"[185] Thereafter, the appellant stopped, looked outside, and let the trainee leave.[186]

---

[176] *Clark*, 32 M.J. at 607.

[177] *Id.*

[178] *Id.*

[179] *Id.* at 608.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

The Army court specifically found that there was "more than sufficient evidence of force to support the finding of guilty of rape."[187] Although the Army court based its decision on the presence of actual force, the court went on to hold that the "doctrine of constructive force would apply even if the court were to accept the appellant's version of the encounter.[188]

Although dicta, this statement seems strange when one considers that the Army court's summary of the appellant's version would indicate that the trainee flirted with the appellant, and initiated the sexual activity by placing her hand on his crotch and saying that they should "make it."[189] Even under such a version of the facts, the Army Court found that there was "sufficient evidence of [the trainee's] belief that any resistance other than the passive stiffening of her body and the unbuttoning of no more than two buttons on her trousers would be futile."[190] It is unclear why the Army court would need to refer to the trainee's testimony to find the requisite fear of harm, if, as the court claimed, it was accepting the appellant's version of the facts for purposes of examining the "constructive force" doctrine.

---

[187] *Id.*

[188] *Id.*

[189] *Id.* According to the Army Court of Military Review, the appellant's version of the events was as follows:

> He testified that [the trainee] flirted with all the males who were in the dining facility, including him. . . . After he entered the shed, [the trainee] arrived and came in behind him. As she closed the door she told the appellant they should "make it." He reached for her and they kissed. He fondled her breast while she placed her hand on his crotch. The appellant then turned off the light, exposed his penis, and hugged her. She caressed his penis, then undressed, and they tried intercourse standing upright. The appellant asked [the trainee] to turn around and bend over. He penetrated her vagina and stopped when she said that someone may come and "catch" them.

[190] *Id.* at 610.

When the COMA reviewed the *Clark* case, it affirmed the rape conviction, but disagreed with the Army court on its finding of actual force.[191] Instead, the COMA, in a fractured opinion, went out of its way to find that there was "constructive force" in the case. In order to do so, the Court of Military Appeals, or at least Judges Crawford and Cox, resorted to the court's prior dicta in *Bradley* to misapply the "parental duress" theory of the "constructive force" doctrine to a situation where a healthy adult, who is not in fear for her life, actually submits to unwanted sexual intercourse because of the "rapist's" superior rank. In its holding, the court stated:

> "[T]he appellant cannot create by his own actions an environment of fear and then seek excusal from the crime of rape by claiming the absence of force," (citations omitted), especially where as here, *passive acquiescence is prompted by the unique situation of dominance and control* presented by appellant's superior rank and position.[192]

In yet another unreported case, *United States v. McCreary,* the Air Force Court of Criminal Appeals followed the lead of the Court of Military Appeals by misapplying the "parental duress" theory of "constructive force," by analogy, to the non-violent forcible sodomy of a basic trainee by an "unscrupulous military training instructor."[193] In *McCreary*, the Air Force court found that the appellant "grossly misused his [military]

---

[191] *Clark*, 35 M.J. 432, 434 (C.M.A. 1992).

[192] *Id.* at 436. (emphasis added) (once again quoting, but not citing to, Justice Martin's statement about children who acquiesce under parental compulsion). *See* discussion *supra* note 162. Chief Judge Sullivan concurred in the result, but found the majority's exposition of the "constructive force" doctrine to be "troublesome." *Id.* at 437. Judge Wiss also concurred in the result, but objected to the incorporation of the "parental duress" language to situations involving soldiers of unequal rank. *Id.* at 436. Judge Gierke not only disagreed with the exposition and application of the "constructive force" doctrine, he did not believe that the government had proven the existence of any force, either actual or constructive, in the case. *Id.* at 437.

[193] McCreary, 1995 WL 77637, at *1

position to force sexual attentions on a young female trainee."[194] Before the appellant approached the trainee for sex, he had warned the trainee's entire class "he had friends in high places who would pursue them throughout their Air Force careers if they crossed him."[195] When the appellant later solicited the trainee to engage in sexual activity, he told her "his superior knew of" and "condoned" his sexual misconduct with the trainees.[196] Because of his earlier threat and because she felt she had no avenue of redress, the trainee had sex with the appellant in his office on more than one occasion.[197]

In affirming the appellant's conviction in *McCreary*, the Air Force court focused on the appellant's "awesome" power to make the trainee repeat basic training and treated this power as the equivalent to the duress stemming from the misuse of parental authority.[198] Accordingly, the Air Force court found that the appellant's conduct "amply" fulfilled the requirement of "constructive force." Furthermore, the Air Force court cited to the dicta in *Bradley* for the proposition that the "constructive force" doctrine is "properly applicable in the military context when intercourse or sodomy is extracted from

---

[194] *Id* at *1. The Air Force Court of Criminal Appeals characterized the case as follows:

> This is a case about sexual activity between a female basic trainee and her male military training instructor—a person cloaked by regulation, custom, and practice with the authority over practically every aspect of her daily existence. More specifically, he held the awesome (to a basic trainee) power of "recycling"—of requiring the trainee to repeat basic training. To anyone who has been through this or a similar regimen, the terror inspired by the threat of having to go through it again is very real.

Id.

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] See discussion, *supra* note 194.

a prosecutrix junior in rank and authority to the appellant through '*a unique situation of dominance and control* where *explicit threats and display of force* by the military superior were *not necessary.*'"[199]

In 1996, the Court of Appeals for the Armed Forces (CAAF) revisited the issue of constructive force in *United States v. Cauley.*[200] Although the case dealt with a unique situation of dominance and control between a Marine Corps Noncommissioned Officer-in-Charge (NCOIC) of a recruiting station and a Marine Corps Reserves enlistee, the CAAF declined the opportunity to again misapply the "parental duress" theory of "constructive force."[201] Instead, the CAAF apparently applied the traditional fear of bodily harm-type of "constructive force."[202] The CAAF relied on traditional constructive force, even though the lower court had specifically found that there "were no threats by the appellant or any other evidence of record that supports a finding of constructive force."[203] The CAAF first noted that "where intimidation or threats of death or physical

---

[199] McCreary, 1995 WL 77637 at *1 (emphasis added).

[200] United States v. Cauley, 45 M.J. 353 (1996).

[201] *Id.* The lower court had specifically mentioned the possible applicability of the "constructive force" doctrine "based on the intimidation inherent in the domineering relationship of a senior noncommissioned officer to a lower ranking victim." United States v. Cauley, No. NMCM 93 00175, 1995 WL 935005 (N.M.Ct.Crim.App. April 7, 1995). The Navy Marine Corps court, however, "did not find sufficient evidence in [the] record to base the element of force on this factor." Id. at *5 n.5.

[202] The CAAF never explicitly stated that it was basing its decision on "constructive force." See *Cauley* 45 M.J. at 353. The CAAF, however, discussed the concept of constructive force immediately before holding that the "factfinder had sufficient evidence before it to conclude beyond a reasonable doubt that force was used." *Id.* at 356.

[203] *Cauley,* 1995 WL 935005 at *5. The Navy-Marine Corps court, like the Army court in Clark, found that there was actual, as opposed to "constructive," force. Id. In this regard, the Navy-Marine Corps court stated:

> As to "physical force, we find that the appellant's use of his legs to force the victim's legs open and his persistence in anal penetration against her resistance were, in both cases, more than

injury make resistance futile, it is said that constructive force has been applied."[204] Thereafter, the Court of Appeals focused on the victim's testimony that she had engaged in vaginal and anal intercourse with appellant because she was "afraid of getting hurt."[205] The Court of Appeals also placed great emphasis on the fact that the appellant, on the morning after the intercourse, threatened to shoot the recruit if she ruined his career by telling anyone what had happened the night before.[206]

Although CAAF declined the opportunity to misapply the "parental duress" theory of "constructive force" in *Cauley*, CAAF gave no indication that it intended to overrule its decision in *Clark* or disavow its dicta in *Bradley*. Therefore the "parental duress" theory of constructive force appears to be alive and well.[207] However, by making the "parental duress" theory of constructive force applicable to adults within the military rank structure, the CAAF has essentially decreed that the enlisted men and women of the American armed forces are like little children who are psychologically incapable of rebuffing a supervisor's unwelcome sexual advances. Unlike little children, however, American soldiers, sailors, airmen, and marines can, and should, say "no" to a superior

---

> incidental to the acts of penetration and, therefore legally sufficient to support the element of force.

Id.

[204] *Cauley*, 45 M.J. at 356 (quoting from *Palmer*, 33 M.J. at 9).

[205] *Id.*

[206] *Id.* Although the existence of a threat made after the rape, might well have been relevant at trial to show the appellant's consciousness of guilt, it would seem to have little relevance on the issue of whether or not the appellant applied "force" prior to penetration. MCM, *supra* note 4, Mil.R.Evid. 404(b).

[207] *See Simpson*, *supra* note 32.

officer who tries to coerce them into unwanted sexual conduct. If the supervisor does not take "no" for an answer, and instead resorts to physical force or a threat of physical force to cause the junior member to submit to intercourse, the supervisor has committed the crime of rape. If not, so long as the junior member is conscious, mobile, and not in fear of bodily harm, he or she can physically just walk away. This is not to say that there might not be some serious adverse consequences of just walking away. For example, the spurned supervisor could prepare an adverse evaluation report, falsely accuse the junior member of a crime, or assign the junior member to a distasteful or dangerous task. However, the junior service member also has quite a few remedies under law and regulation. He or she can inform the chain of command, notify the police, or file a complaint under Article 136, UCMJ, or under the Equal Employment Opportunity Program. Likewise, the junior member can usually appeal an adverse evaluation and can always contest a military criminal charge with the help of a military attorney. This is not to say that the junior service member will not be under pressure to acquiesce to the superior's lascivious demands, but it does show that a service member is not at all similar to a little child who has nowhere to turn and who must be protected from parents or stepparents.

C. Detrimental Effects of the Misapplication of the "Constructive Force" Doctrine

Not surprisingly, the misapplication of the "parental duress" theory of the "constructive force" doctrine by the appellate military courts has had a detrimental effect on the administration of military justice. These effects include judicial confusion, problems of vagueness and inadequate notice, overcharging by prosecutors, and sentence disparity.

1. Judicial Confusion

The most disconcerting result of the misapplication of the "parental duress" theory of "constructive force" is the degree to which the military appellate courts are themselves confused as to when "constructive force" applies to a nonviolent situation involving a competent adult victim. Such judicial confusion is extremely harmful because it leads to general confusion among lower courts, military practitioners, and the people to whom the rape law applies.

The most apparent example of this state of confusion can be found in the Court of Military Appeals' fractured opinion in *Clark*.[208] Only two of the judges, Judges Crawford and Cox, believed that "constructive force" could be found in situations where an adult victim passively acquiesces to the sexual advances of a superior based upon his "unique situation of dominance and control."[209] Although Senior Judge Sullivan and the late Judge Wiss concurred in the result, they disagreed with Judges Cox and Crawford on their misapplication of the "parental duress" theory of "constructive force" to the facts of the case.[210] They pointed out that the language of the lead opinion could easily be read to imply that all sexual intercourse between a person of superior rank or in a position of authority with an adult of inferior rank or position automatically equates to rape. As Judge Wiss noted, if that were indeed the case, then all of the many military

---

[208] *See Clark*, 35 M.J. 432 (C.M.A. 1992)

[209] *Id.* at 436. Although it is clear that a military supervisor has far reaching administrative and disciplinary powers, Judges Crawford and Cox make no attempt to explain why a trainee should be more fearful of bodily injury or death from a superior officer than a fellow trainee. *Id.*

[210] *Id.* at 436. Chief Judge Sullivan found Judge Crawford's "exposition on the doctrine of constructive force" to be "troublesome." Id. at 436. Likewise, the late Judge Wiss stated that Judge Crawford's finding

fraternization cases under Article 134, UCMJ, which usually find their way to CAAF, could conceivably arrive as rape convictions under Article 120, UCMJ as opposed to fraternization convictions.[211]

In his dissent, Judge Gierke not only denounced the majority's misapplication of the "parental duress" theory, he found the record completely "devoid of evidence of force," either "actual or constructive."[212] Judge Gierke noted that the court had extended application of the "constructive force doctrine to rape cases involving military relationships, but only when the accused sufficiently exploited the military relationship to exert a psychologically intimidating presence that could imply a threat of death or bodily harm."[213] Although Judge Gierke acknowledged that "a military relationship existed" in the *Clark* case, he stressed that there was no evidence that the "appellant exploited his status as her supervisor to make her have sex with him."[214] Furthermore, the victim "never testified or implied that she later submitted to sexual intercourse under compulsion of military command, and she never indicated that [the] appellant's rank

---

of "constructive force" in the appellant's "unique situation of dominance and control presented by the appellant's rank and position was "far too all-inclusive." *Id.*

[211] *Id.* Fraternization carries a maximum possible punishment of two years confinement, total forfeitures of all pay and allowances, and a dismissal. *See* MCM, *supra* note 4, pt. IV, 83 (e).

[212] *Clark*, 35 M.J. at 437. (Gierke, J., dissenting).

[213] *Id.* at 438-39 (citing *Bradley*, 28 M.J. at 197 and *Hicks*, 24 M.J. at 3). Although Judge Gierke's statement is technically correct, it implies that the court actually based its prior findings of "constructive force" on "exploited military status." Id. Instead, the written opinions in Bradley and Hicks rely on other circumstances such as the secluded locations the tone and volume of the voices, the physical size differentials, and implied threats to overcome any resistance. *See* Bradley, 28 M.J. at 200; Hicks, 24 M.J. at 6.

[214] *Clark*, 35 M.J. at 439.

played a role in her fear of death at the time."[215] Additionally, Judge Gierke's review of the record of trial found no evidence whatsoever that the "appellant's conduct was reasonably calculated to give rise to a fear on [the victim's] part to the extent that she would be unable to resist sexual intercourse with him."[216] In Judge Gierke's view, the victim had no reason to think that the appellant would turn "into a dangerous man who could be set off by any hint of resistance."[217] Although the appellant's conduct was "deplorable," Judge Gierke concluded he should not have been convicted of the crime of rape.[218]

Not surprisingly, the confusion and disagreement displayed by the highest court of the Armed Forces has had an adverse effect on individual service courts of criminal appeals. .[219] The Coast Guard Court of Military Review was the first lower court to be adversely affected by the opinions in *Clark.* In *United States v. Webster*, the Coast Guard court was reviewing a case based on the non-violent rape of a Boat Coxswain (E-4) by a Machinery Technician Second Class (E-5). [220] Although the Coast Guard court affirmed

---

[215] *Id.* at 437.

[216] *Id.* at 440.

[217] *Id.*

[218] *Id.* Judge Gierke noted that the lead opinion "blurs the distinction" between fraternization and rape by making the appellant a rapist "solely because he was [the trainee's] supervisor."

[219] *See e.g.*, U.S. v. Pierce, 40 M.J. 584 (A.C.M.R. 1994) (en banc); McCreary, 1995 WL 77637 at *1, United States v. Webster, 37 M.J. 670 (C.G.C.M.R. 1993); Cauley, 1995 WL 935005 at *1.

[220] Webster, 37 M.J. at 671-72. The appellant, in *Webster*, had been convicted by a special court-martial empowered to adjudge a bad conduct discharge and had been sentenced to a mere two months confinement. In this case, the victim was a who testified that she told the appellant "no" several times and was "angry at the appellant," but was "never afraid that the appellant might harm her." *Id.* Additionally the nature of their duty assignments was such that the appellant was actually "subject to her orders" when they were underway on a search and rescue case. *Id.*

the conviction by finding that under the "totality of the circumstances" the act of sexual intercourse "was done by force and without her consent," each judge on the Coast Guard court wrote a separate opinion criticizing the confusing state of military rape law and bemoaning the lack of legislative reform.[221]

In the majority opinion, Judge Edwards noted that neither the UCMJ nor the Manual for Courts-Martial "makes any distinction among any types of rape."[222] He then discussed the characteristics of acquaintance rape and called it a "troubling area" for the military. He concluded by stating that "[a]mending Article 120, UCMJ, would be one step in the right direction."[223]

In his separate concurrence, Judge Bridgman criticized the fact that Article 120(a), UCMJ has remained substantially unchanged since its enactment, and criticized the "lack of authoritative guidance" from the appellate courts in the area.[224] Judge Bridgman, somewhat tongue-in-cheek, invited military practitioners to "peruse the four separate

---

[221] *Id.* at 675.

[222] *Id.* at 674.

[223] *Id.* at 675. In his dissent, Chief Judge Baum concurred with all of Judge Edwards' opinion, except for the factual conclusion concerning the rape and the action on the sentence. *Id.* at 684. Like his fellow judges, he criticized the confusing state of rape law and the lack of legislative reform. *Id.* at 684-85. He noted: [v]arious degrees of seriousness could be provided for in the Uniform Code of Military Justice with lowered proof requirements for the less serious sexual crimes, particularly with regard to proof of force and physical resistance." Id. at 685. "Until such amendments are made, however," Chief Judge Baum also cautioned, "rape, with a statutorily authorized penalty of death, continues to be an offense that can be treated as seriously as first degree murder. I do not believe the accused is guilty of a crime of such magnitude.".

[224] *Id.* at 683.

opinions in *United States v. Clark* and the cases cited therein for *such illumination as they may find* on the application of actual or constructive force."[225]

The appellate confusion has also had a detrimental effect on the functioning of the Army Court of Military Review. In *United States v. Pierce*, one panel of the Army Court examined the appellant's rape conviction and determined that the evidence was factually insufficient to sustain the conviction.[226] Accordingly, the panel set aside the findings and the sentence and ordered that the appellant be released from confinement.[227] The full court granted the Government's request for a reconsideration *en banc*.[228] In a lengthy split decision, the court decided that "the request for reconsideration *en banc* [had been] improvidently granted" and returned the case to the original panel.[229] The majority opinion, however, was only joined by three judges.[230]

Judge Morgan, writing for the five dissenters, argued that "when a panel erroneously overturns a conviction for the rape of a female soldier by a male soldier in a barracks setting, an exceptionally important question is presented, the proper resolution of which

---

[225] *Id.* at 684 (citations omitted) (emphasis added).

[226] Pierce, 40 M.J. at 584 (en banc) (containing a discussion of the prior history of the case).

[227] *Id.*

[228] *Id.*

[229] *Id.* at 587-88.

[230] *Id.* at 588. Although he concurred with the result, Judge Russell wrote a separate concurrence in which he joined the Coast Guard judges in lamenting how unfortunate it was that "Congress has not acted to change Article 120, UCMJ." *Id.* at 589. He also pointed out that the current law has "harsh effects of efficacy of rape convictions" because it fails to specifically address non-traditional, non-violent rapes. Id. Another Army jurist, Judge Johnston concurred in the result, but disagreed that the court even had the authority to reconsider en banc, an individual panel decision based upon a finding of factual insufficiency. *Id.* at 590.

is crucial to high morale and good order and discipline in today's Army."[231] Although the dissenters seemed to agree that Article 120, UCMJ needed to be modified, they firmly believed that in the "absence of executive or legislative clarification, the burden historically falls to the judiciary to confront important legal issues."[232] Apparently the dissenters intended that the judiciary should be free to continue to redefine the statutory elements of "force" and "non consent," in a manner that would permit the liberal prosecution of non-violent rapes.[233]

The simplest and most effective way to clear up all of the present confusion in military rape law caused by the misapplication of the "parental duress" theory would be to create a separate offense that specifically covers such situations.[234] Such a proposed offense would need to cover the threats of possible adverse action as well as those situations that are inherently coercive, such as the parent/child relationship and the drill sergeant/trainee. Such a proposed statute would be most effective in discouraging the courts from misapplying the "parental duress" theory of "constructive force" if it actually made use of the CAAF's language in *Clark and Bradley* concerning "unique situation['s] of dominance and control."[235]

2. Vagueness/Inadequate Notice

---

[231] *Id.* at 595.

[232] *Id.* at 598.

[233] *Id.* at 599. On remand, amidst such strong criticism by one half of the entire Army Court of Military Review, the original panel reconsidered the case and once again held that the evidence was factually insufficient to support the rape conviction. United States v Pierce, 40 M.J. 601, 606 (A.C.M.R. 1994)

[234] *See* discussion *supra,* Part VI.A.

[235] *Clark,* 35 M.J. at 436; *Bradley*, 28 M.J. at 200.

The general confusion caused by the misapplication of the "parental duress" theory creates the risk that Article 120(a) will be invalidated as being unconstitutionally vague under the Due Process Clause of the Fifth Amendment. In his dissent in *Clark*, Judge Gierke of the CAAF argued that the military appellate courts are misapplying Article 120(a) to such a degree that the statute may well be found to be unconstitutionally vague.[236] He cited to the United States Supreme Court for the proposition that a "criminal statute must not be so vague that an ordinary person cannot distinguish between criminal and innocent behavior."[237] As Justice Sutherland noted 74 years ago:

> The result of [statutory vagueness] is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impression of juries as to whether given areas are to be included... The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.[238]

Unlike most statutes challenged for vagueness, which are broadly drafted but narrowly construed, the military rape provision is narrowly drafted but broadly construed.[239] To make matters worse, the military courts do not always construe the statute in the same way. For example, actions that might be construed as actual force in one court are inexplicably found to constitute "constructive force" in another. Likewise,

---

[236] *Clark*, 35 M.J. at 441 (Gierke, J., dissenting)

[237] United States v. Clark, 35 M.J. at 441 (citing Connally v. General Construction Co., 269 U.S. 385 (1926)). *But see*, United States v. National Dairy Corp., 372 U.S. 29, 32 (noting that there is a "strong presumptive validity that attaches to an Act of Congress" so that such statutes are "not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language").

[238] *Connally*, 269 U.S. at 395.

[239] See Parker v. Levy, 417 U.S. 733 (1974) (holding that Articles 133 and 134, UCMJ were not void for vagueness as defined by the President, implemented by the services, and interpreted by the courts).

the mere existence of an inequality in rank between a rapist and his victim may be found to be "constructive force" or it might not. If it is, the accused is branded as a rapist and subjected to possible sentence death or life in prison. If not, he is either convicted of a lesser offense or walks away unpunished.

In analyzing how the void for vagueness doctrine applied to *Clark*, Judge Gierke found that the appellant should have been aware that his conduct would violate military fraternization regulations, but could not be expected to be aware that his conduct would violate the very serious proscription against rape.[240] Chief Judge Baum of the Coast Guard echoed Judge Gierke's opinion on the potential vagueness of Article 120(a).[241] Likewise, Judge Bridgman, another Coast Guard Judge, lamented the fact that "as Article 120(a), UCMJ is currently applied, the offense of rape in the military justice system is guided, not by law, but by individual perceptions of the offense."[242]

Although "ignorance of the law" is generally not an excuse for criminal conduct, both the victim and a potential accused deserve some guidance and certainty as to what constitutes the offense of rape.[243] Unfortunately, a typical soldier's reading of Article 120, UCMJ would lead him or her to believe that the statute actually requires that the act of intercourse be accomplished "by force" and "without consent."[244] The soldier's notion

---

[240] *Clark*, 35 M.J. at 441 (Gierke, J., dissenting).

[241] *Webster*, 37 M.J at 684-85 (Baum, C.J., concurring in part, dissenting in part).

[242]. *Id.* at 683 (Bridgman J. concurring) (noting that "the offense of rape in the military justice system is guided, not by law, but by individual perceptions of the offense").

[243] Ratzlaf v. United States, 510 U.S. 135, 149 (1994).

[244] *See* discussion *supra*, Part II.

that rape is a serious crime of violence would be reinforced if the soldier were aware that rape and murder are the only offenses not related to national security and war under the UCMJ that carry the possibility of the death penalty.

If the soldier went on to read the Manual provisions explaining "force and lack of consent" and the guidance concerning inferences of consent, he or she would probably be thoroughly confused. If the soldier had some legal research skills, he or she could read the case law in an effort to determine what conduct meets the offense and what conduct does not. If the soldier were to read *Clark, Webster*, and *Pierce*, the soldier would be even more confused. After all, if more than 10 learned judges sitting on one appellate court can't agree when a rape has been committed, how can they expect our soldiers to know?[245]

As the Supreme Court noted in *Conally v. General Construction Co.*:

> The dividing line between what is lawful and what is unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit to different conclusions. A criminal statute cannot rest on an uncertain foundation. The crime and the elements constituting it must be so clearly expressed that an ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.[246]

Congress could draw such a dividing line by inserting a statute that specifically prohibits the non-violent coercion of another to unwillingly engage in sexual intercourse.[247] By taking this step, Congress would effectively narrow the application of

---

[245] *See* Pierce, 40 M.J. at 584. *See also* discussion *supra* Part V.C.1.

[246] *Connally* 269 U.S. at 393 citing United States v. Capital Traction Co., 34 App. D.C. 592, 598 (1902).

[247] *See* discussion, *supra* Part VI.A.

Article 120(a) to those instances where actual force or traditional constructive force were used, while specifically prohibiting non-violent coercive sexual conduct under the proposed offense of "coercive sexual intercourse."

3. Overcharging

The very fact that military judges and the appellate courts have supported the misapplication of the "parental duress" theory of rape to the non-violent coercion of a competent adult victim, has opened the courthouse doors for military prosecutors to overcharge their cases. Although such overcharging is neither illegal nor unethical, it has a detrimental effect on the administration of military justice. As Judge Bridgman observed in *Webster*, the crime of rape in the military has "innumerable permutations, existing solely in the minds of those implementing the military justice system."[248]

For a variety of reasons, trial counsel are often tempted to charge any nonconsensual sexual misconduct involving vaginal penetration as a rape.[249] Theoretically, a trial counsel has the following choices available in such as case:

1. Rape (which carries a maximum punishment of death or life imprisonment);[250]

2. Assault with intent to commit rape (which carries a maximum punishment of 20 years confinement);[251]

---

[248] Webster, 37 M.J. at 683.

[249] Additionally, it would be disingenuous, to say that the average military trial counsel would not rather see a successful legally sufficient rape prosecution annotated on his or her officer evaluation report (OER) than a legally sufficient indecent assault conviction.

[250] UCMJ art. 120(a).

3. Indecent assault (which carries a maximum punishment of five years of confinement);[252]

4. Extortion (which carries a maximum punishment of three years of confinement)[253]

5. Adultery (which carries a maximum punishment of one year of confinement);[254]

6. Assault consummated by a battery (which carries a maximum punishment of six months of confinement);[255] and,

7. Simple assault (which carries a maximum punishment of three months of confinement).[256]

As a practical matter, none of these choices are very appealing to a trial counsel. Assault with intent to commit rape is a specific intent crime which is often more difficult to prove than rape. Assault consummated by a battery and simple assault, not only carry very low maximum sentences, they do not capture the essence of the offense. Although extortion reflects the coercive aspect of the crime, it fails to denote the violation of sexual

---

[251] UCMJ art. 134; *See* MCM, *supra* note 4, pt. IV, ¶ 64.

[252] UCMJ art. 134; *See* MCM, *supra* note 4, pt. IV, ¶ 63.

[253] UCMJ art. 127; *See* MCM, *supra* note 4, pt. IV, ¶ 53.

[254] UCMJ art. 134; *See* MCM, *supra* note 4, pt. IV, ¶ 62.

[255] UCMJ art. 128; *See* MCM, *supra* note 4, pt. IV, ¶ 54.

[256] UCMJ art. 128; *See* MCM, *supra* note 4, pt. IV, ¶ 54.

integrity inherent in the offense. Furthermore, extortion only carries a three-year maximum penalty. Adultery neither carries a high sentence nor captures the involuntary nature of the sexual intercourse. Although indecent assault somewhat captures the essence of the offense of non-violent unwanted intercourse, it fails to indicate that sexual intercourse occurred. Additionally, indecent assault is a specific intent crime that could be satisfied by an unwanted kiss or a simple touching of a person's genitalia. As such, by charging this offense, the prosecutor may seem to trivialize the incident, especially in the eyes of the victim. Furthermore, the most egregious indecent assault still carries a relatively light five-year maximum punishment.

If the victim is a subordinate of the accused, the following additional offenses might be available:

1. Cruelty and Maltreatment (which carries a maximum punishment of one year of confinement);[257] and

2. Fraternization (which carries a maximum punishment of two years of confinement).[258]

These two military offenses suffer the same shortcomings as many of the previously discussed choices. Cruelty and maltreatment does not connote the sexual nature of the offense and fraternization does not convey the involuntary nature of the offense. Most importantly though, neither offense carries a significant maximum punishment.

---

[257] UCMJ art. 93; *See* MCM, *supra* note 4, pt. IV, ¶ 17.

[258] UCMJ art. 134; *See* MCM, *supra* note 4, pt. IV, ¶ 83.

Not surprisingly then, most prosecutors will choose to charge rape as the primary offense. After all, no military or civilian offense carries a higher maximum punishment.[259] Because rape is still considered to be a general intent crime, there is no need to prove that the accused actually intended to use "force" to obtain intercourse without the victim's consent. As to the force element, it is sufficient to prove that the accused intended to engage in intercourse and that such intercourse occurred as a result of use of "constructive force." Most importantly though, due to the misapplication of the "parental duress" theory to adult victims, the prosecutor may be justified in basing his or her theory of the case on the "unique situation of dominance and control" inherent in the accused's "superior rank and position."

If, on the other hand, the prosecutor had the ability to charge the accused with an offense that both accurately captured the nature of the offense and provided for a reasonably severe maximum penalty, the prosecutor would be more likely to resist the temptation to charge instances of non-violent coercive sexual intercourse as a rape. As an added benefit, the simple existence of such an offense may result in a higher percentage of rape convictions at trial and a greater number of convictions overall. Because many of the panel members view rape as a crime of violence, the panel would be more likely to return a finding of guilty to the offense of "coercive sexual intercourse"

[259] As a practical matter, judges and panel members may be more willing to convict an accused if the crime more accurately reflects the evidence presented at trial. It has been my personal experience that some judges and panel members exhibit a "but for the grace of God go I" mentality, and are unwilling to convict a non-violent offender of rape. In these cases, a miscreant goes unpunished because the panel was unwilling to brand him as a rapist.

than rape in cases in which there was no actual force or violence and a mentally and physically competent victim.[260]

In a close case, such as where there is some evidence of actual force or in which the victim might have been impaired, the prosecutor could charge both rape and coercive sexual intercourse, based upon the exigencies of proof. If the evidence at trial shows that the accused used force or threatened bodily harm, the prosecutor could argue for a rape conviction. If the evidence shows that the accused made use of an actual or implied threat to take a non-violent adverse action against the victim, the prosecutor could argue for a coercive sexual intercourse conviction. If a conviction were to result under the proposed amendment, the conviction would accurately be labeled and subjected to a correspondingly appropriate maximum penalty.

4. Sentence Disparity

As previously discussed, the misapplication of the "parental duress" theory of "constructive force" to competent adult victims allows for an extremely wide range of conduct to be punished as "rape." Unfortunately, "[t]he result under such an approach is that some offenders are subjected to punishment more drastic than any rational

[260] This would be especially important if the military were to do away with panel member sentencing. *See generally*, Major Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military* 140 MIL. L. REV. 1 (1993) (proposing that military judges be made the sole sentencing body in all courts-martial). Under the current system, if an accused elects to be tried by a panel, that panel will decide the accused's punishment. In such cases, a panel that is reluctant to expose a non violent accused to a possible life sentence may do so with an understanding that they will be able to limit the sentence. However, if that same panel had no control over the eventual sentence, that panel would be even less likely to convict the accused.

sentencing grading scheme would allow, while others are windfall beneficiaries of the reluctance of jurors to condemn every offender to death or life imprisonment."[261]

Furthermore, although rape is one of our two most serious peacetime felonies, rape cases today are tried at every level of court.[262] More often than one would expect, "rape" cases are even handled through non-judicial punishment proceedings under Article 15, UCMJ.[263] Such a disposition is somewhat analogous to a person being convicted of intentional vehicular homicide by a misdemeanor traffic court judge.

Even when the rape allegation is referred to a court-martial and conviction results, there is no guarantee that an accused will receive a punishment worthy of a rape. For example, the panel members may follow the military judge's instructions and convict the soldier of rape, and then proceed to sentence that same soldier to a relatively light punishment because he used no force against the victim. On the other hand, a panel might decide to impose a very severe sentence just because the accused has been convicted of rape.

As things stand today, therefore, military rape sentences can be very light or they can be very heavy, depending on the facts or on the will of a panel or judge on a certain day.

---

[261] *See* MPC COMMENTARIES, *supra* note 12.

[262] For example, the E-5 "rapist" in the *Webster* case, received partial forfeitures, reduction to E-1, a bad conduct discharge and a mere two months of confinement. He received this light sentence even though he was convicted of committing rape, violating two separate lawful general regulations, committing two assaults consummated by a battery, committing three indecent assaults, and communicating indecent language to another. Webster, 37 M.J. at 670.

[263] Statistical printout of Navy and Marine Corps proceedings involving the crime of rape furnished by the office of the Office of the Chief Judge, Navy Trial Judiciary (on file with the author) [hereinafter Navy Statistics]. Additionally, the author has personally witnessed a "rape" disposed of at proceedings under Article 15, UCMJ.

In the past ten years, military members tried for rape have received letters of reprimand, minor forfeitures, reduction in rank, and confinement in terms of days and months rather than years upon conviction.[264] Others have been sentenced to life in prison or other substantial periods of incarceration. As one military appellate judge noted, "[I]n the absence of reform of Article 120, UCMJ, we are left to the unguided ad hoc application of the trial court's classification of 'degrees' of rape, as reflected in the sentence adjudged.[265]

Sentence disparity caused by the misapplication of the "parental duress" theory in turn triggers unnecessary criticism of the military justice system. For example, when the media reports the results of a rape trial, the headlines, sound bites, and articles typically annotate only that the accused was convicted of rape and specify the accused's sentence. This type of reporting, while technically accurate, leads to the public impression that the military justice system is unfair. For example, if the sentence was light, perhaps due to an absence of physical force, the media and women's rights advocates can charge that the military condones "rape." If, on the other hand, the case involved nonviolent coercive sex and the adjudged sentence was severe, the media and other groups can charge that the military justice system is unreasonably harsh. This is a public relations no-win situation.

If, however, the military made use of an offense, such as that proposed by this thesis, that more accurately reflected the nature of the crime committed, there would be less room for public criticism. Most members of the public would expect a person convicted

---

[264] *See* Navy Statistics, *supra* note 263.

[265] *Webster*, 37 M.J. at 675.

of a crime with a name such as coercive sexual intercourse to receive a lighter sentence than a person convicted of rape.

Although the creation of a separate offense covering coercive sexual intercourse would not completely eliminate sentence disparity, it would at least limit the liability of nonviolent offenders. Occasionally, a non-violent offender, such as a parent, would be sentenced to the maximum punishment allowed by the new statute. Conversely, it is conceivable that a violent rapist, with very strong mitigation evidence, could receive only some minor punishment. One would expect such results to be an anomaly.

The addition of a specific offense dealing with non-violent coercive intercourse would have the added benefit of making the offense and the punishment more closely fit the severity of the crime. Accordingly, one would expect a rapist to receive a more severe sentence than someone who engaged in coercive sexual intercourse.

VI. Proposed Amendments to the Uniform Code and the MCM.

A. Proposed Text of the Offense

Coercive Sexual Intercourse.

Article 120(c), UCMJ. Any person subject to this chapter who purposely causes someone, other than his or her lawful spouse to--

(1) unwillingly engage in an act of sexual intercourse by threatening to take a non-violent adverse action against that person, or some other person, such as would cause a

reasonable person in the position of the person being threatened to unwillingly submit to an act of sexual intercourse; or

(2) unwillingly engage in an act of sexual intercourse by misusing a unique position of dominance and control in such a way as such as would cause a reasonable person in the position of the person being threatened to unwillingly submit to an act of sexual intercourse is guilty of coercive sexual intercourse and shall be punished as a court-martial shall direct.

Discussion of the Proposed Offense

1. Applicable Situations

The proposed offense has been drafted in such a way to apply to those rape fact patterns that have most plagued the appellate courts; those directly involving "parental duress" and those involving situations that are somewhat analogous to "parental duress." Accordingly, the proposed offense specifically would cover all of those situations in which the military appellate courts have applied and misapplied the "parental duress" theory of "constructive force." As an added benefit, the proposed offense would also be available in some of the situations in which the courts have struggled to find actual force or a fear of bodily harm in order to affirm the conviction.

Article 120(c)(1), UCMJ, would apply to those situations in which the perpetrator threatens to take an adverse punitive, administrative, or economic action in order to obtain sexual intercourse from his or her victim. It would also cover those situations in

which the perpetrator gains the acquiescence of the victim by an implied threat to take such an adverse action.

Article 120(c)(2), UCMJ, would be applicable to those inherently coercive situations in which the accused holds a unique position of dominance and control over his victim by virtue of a professional or familial relationship. The most common example of such an inherently coercive familial environment would involve a parental relationship such as that between a parent, stepparent, or foster parent, and a child over the age of 16 years. The most common type of inherently coercive non-familial relationship would involve a basic training program or advanced individual training course. Other inherently coercive scenarios might involve a direct chain of command or a law enforcement investigation.

2. Elements of Proof.

a. Coercive intercourse by threat

(1) That the accused purposely caused someone, other than his or her spouse, to submit to an act of sexual intercourse;

(2) That the accused caused the submission by knowingly threatening to take a serious non-violent adverse action against the person being threatened or some other person;

(3) That the threatened adverse action is of sufficient severity to cause a reasonable person in the position of the person being threatened to submit to unwanted intercourse; and,

(4) That the person being threatened submitted to the sexual intercourse in fear of the threatened action.

b. Coercive intercourse through misuse of position.

(1) That the accused purposely caused someone, other than his or her spouse, to submit to an act of sexual intercourse;

(2) That the accused caused the submission by knowingly making use of a unique position of dominance and control; and,

(3) That the person being threatened submitted to the sexual intercourse because of the existence of the unique position of dominance and control.

3. Definitions.

a. Purposefully

Unlike rape, coercive sexual intercourse would be a specific intent crime. It would require the specific intent to cause the victim to submit to sexual intercourse either through the use of a threat of adverse action or through the misuse of one's position of authority. [266] The offense of coercive sexual intercourse would involve nonviolent coercive conduct and situations that are somewhat more complex and less likely to be immediately recognized as criminal. It would, therefore, be appropriate to punish

[266] Rape, like murder, assault, kidnapping, and other common law crimes of violence, has long been considered a general intent crime. This resulted from the simple fact that these types of crimes involve conduct that only the most seriously impaired offenders would not recognize as criminal. Accordingly, voluntary intoxication was normally not held to be a defense to general intent crimes.

offenders only if they specifically intended to cause another person to engage in sexual intercourse through the use of unlawful coercion.

If "coercive sexual intercourse" were classified as a general intent crime, it would be possible for a person in a position of rank or authority to unwittingly cause a person to engage in sexual intercourse by virtue of fear on the part of the victim. If the proposed offense required only general intent, such an accused would be guilty so long as he had the general intent to engage in sexual intercourse with the person who was submitting.

For example, a senior officer might well successfully solicit sex from a family member of one of his subordinates. Even though the family member has no desire to engage in sexual relations with the senior officer, she may submit because she fears that the senior officer will take an adverse action against the subordinate. Although this fear may be reasonable, it would be unfair to punish the senior officer unless he specifically intended to make use of his implied authority to take such adverse action. If, however, the offense were a general intent crime, the superior officer would need only the desire to engage in intercourse in order to be convicted. Likewise, if coercive sexual intercourse were a general intent crime, an intoxicated person in a position of authority might well be convicted of coercive intercourse by making an innocent remark to a subordinate that causes the subordinate person to feel threatened and engage in intercourse.

The proposed statute would require that the accused have the specific intent to cause the other person to engage in intercourse by threatening to take an adverse action or through misuse of his authority. As a practical matter, though, military prosecutors should have little difficulty in proving specific intent in most cases. Most persons who

have authority, especially those in the military, are keenly aware of that authority and the effect that that authority has on other individuals. Therefore, it will usually be possible for a prosecutor to prove the accused's intent through his or her words, deeds, and prior knowledge.

The clearest indicator of an accused's specific intent to commit the proposed offense would be found where the accused expressly threatens to take an adverse action if the victim refuses his sexual advances. In such a case the specific intent is obvious. A closely related scenario involves such a threat made days, weeks, or months before the act of sexual intercourse. The closer in time the threat is to the act of intercourse, the more likely it will be that a finder of fact will find that the accused had the specific intent to engage in the prohibited conduct. In the absence of evidence to the contrary, the fact finder would be able to infer that there was no specific intent if the threat was made more than a year prior to the act of intercourse.

Another closely related situation would arise where the accused hints or refers to the accused's ability to take an adverse action should the victim fail to submit. In such a case, the finder of fact would be tasked with determining whether or not the hint or reference could be construed as a threat. If so, the hint or reference would be sufficient.

The most problematic situation would involve an inherently coercive environment wherein both the accused and the victim are aware or should be aware of the accused's "unique situation of dominance and control" based upon his or her superior position of authority or rank. These inherently coercive environments will typically involve basic training facilities, advanced individual training facilities, legal guardianships, criminal

investigations, and direct chains of command. In each of these situations, the accused will know or should know that sexual contact with such potential victims is strictly prohibited. Often there will be a regulation that recognizes the coercive nature of the relationship and specifically prohibits such sexual contact. If the accused conveys a desire to engage in sexual intercourse with a person who is in that environment, the accused runs the risk that that person will submit to the intercourse because of the existence of the unique position of dominance and control.

b. Caused

So long as the accused's threat or the existence of the accused's unique position of dominance and control actually motivated the victim's submission, the accused has caused that submission. Although the threat or status must be the proximate cause of the submission, it need not be the only cause. For example, if the victim submitted partially because she feared the threatened action and partially because she found the appellant sexually attractive, the appellant still has caused her submission.

Although this may seem to be a harsh rule for the accused, it is premised on the notion that a person in an obvious position of authority knows or should know that he or she has great power over the people who are subject to that authority. Accordingly, when such an authority figure engages in sexual conduct with a person subject to that authority, that person does so at his or her own risk, especially if they have previously made an explicit threatened adverse action.

c. Sexual Intercourse

Unlike the present military rape statute, the offense of coercive sexual intercourse would apply not only to genital copulation between a male and a female, but also to anal and oral intercourse between a male and female, two males, and two females. Accordingly, sexual intercourse would include the penetration, however slight, of any of the following:

(1) one person's vagina by another person's penis;

(2) one person's anus by another person's penis;

(3) one person's mouth by another person's penis;

(4) one person's vagina by another person's mouth or tongue; or

(4) one person's mouth by another person's vagina.

Because this broadened definition of sexual intercourse would encompass many of the sexual acts that are presently proscribed by the military rape and sodomy provisions, it could cause some confusion in the absence of simple legislative and executive reforms. Therefore, the proposed amendment of Article 120 would specifically apply the proposed definition to the existing offenses of rape and carnal knowledge. Likewise, the adoption of the proposal would require the President to eliminate the enhanced maximum punishment provision for sodomy that presently applies when the act of sodomy is accomplished by force and without consent.

By grouping all of the various sexual penetration offenses under Article 120, UCMJ, the proposal makes it more convenient for military practitioners to handle these closely

related offenses. It also more accurately captures the conduct in terms that correspond to the terms that are used by the lay person. For example, most lay persons would refer to the forcible anal sodomy of a man by a man as a "rape." However, under the present version of the UCMJ, such a "rape" would be classified as a "sodomy," with an enhanced punishment based upon the fact that it was accomplished "by force and without consent."[267]

Sodomy, unlike rape, does not carry a possible death sentence. Consequently, a male who anally sodomizes a young girl in violation of Article 125, UCMJ, faces a lesser maximum penalty than a male who vaginally rapes a young girl in violation of Article 120, UCMJ. Likewise, a man who violently "rapes" another male by anally sodomizing him, is not subject to the same criminal sanctions as a male who violently rapes a female by forcing her to engage in vaginal intercourse. There is no rational basis for these distinctions.

As an added benefit, the inclusion of anal and oral intercourse would give a practical effect to the largely symbolic amendment that made Article 120, UCMJ, gender neutral. As discussed previously, by limiting sexual intercourse to vaginal intercourse, the UCMJ virtually guarantees that no woman will ever be convicted of forcibly raping a male under any circumstances short of the "parental duress" theory.

In order to effect these changes, Congress would need only include the offense of "coercive sexual intercourse," and specifically define sexual intercourse for rape, carnal knowledge, and coercive intercourse as encompassing vaginal, anal, and oral intercourse.

---

[267] *See* MCM, *supra* note 4, pt. IV, ¶ 51(e)(1).

Thereafter, the President need only rescind the enhanced sentencing provisions pertaining to Article 125, UCMJ.

d. Threat

A threat may be communicated by any means but must be received by the intended victim. The threat may be expressed or implied, so long as it expresses a present ability, determination, or intent to take an adverse action. Threats of bodily harm or of death, however, would not constitute a threat under the proposed offense. Such threats would continue to fall within the realm of the force required for rape, pursuant to the traditional "constructive force" doctrine. In those cases in which an accused has threatened the victim with physical force and with adverse actions, the trial counsel would be justified in charging both rape and coercive sexual intercourse.

e. Non-violent Adverse Action

Non-violent adverse actions are those actions which are calculated to harm another person materially with respect to the other person's health, safety, business, calling, career, financial condition, reputation or personal relationships. Adverse actions would include, but not be limited to the following examples:

(1) Assigning a failing grade in an academic course or "recycling" a student through the training a second time;

(2) Reporting criminal conduct, arresting, or preferring criminal charges;

(3) Taking away a minor child's privileges;

(4) Writing a derogatory evaluation or fitness report;

(5) Initiating a separation action;

(6) Assigning dangerous or unpleasant duties;

(7) Exposing information causing ridicule or scorn; and

(8) Providing false testimony or withholding information relating to a legal matter.

As these examples show, a wide variety of actions could be considered as constituting nonviolent adverse actions. The concept of adverse action is not intended to be unlimited. Accordingly, an adverse action would have to be calculated to cause more than mere trivial harm.

f. Reasonable Person

A reasonable person in the position of the person submitting to the unwanted intercourse does not do so out of fear of a trivial adverse action. For example, one would expect that a reasonable person would submit if that person's job or a promotion were threatened or if that person were threatened with a criminal charge.[268] However, one would not expect a reasonable person to submit to sexual activity in order to avoid a traffic ticket.[269] The finders of fact will make the determination based upon their common experience on whether or not a reasonable person in that position would submit to unwanted sexual intercourse based upon the totality of the circumstances.

[268] MPC COMMENTARIES at 312.

4. Spousal Exception

Unlike rape, there would be a spousal exception to the proposed offense of coercive sexual intercourse. This is not to imply that a husband who obtains sex from his wife by coercive means has not engaged in blameworthy conduct. The enactment of a spousal exception would merely recognize that there are too many different marital arrangements, agreements, disagreements, and bargains to warrant the intrusion of the military criminal law into the marital bedroom.[270] Whereas sexual intimacy is an accepted, state sanctioned, aspect of most marriages, the same sexual intimacy is not a regularly accepted aspect of other relationships such as those which would be covered by the proposed statutes.

5. Permissible Inferences

If the accused is actually aware of his unique situation of dominion and control over the victim, and the accused thereafter causes a person whom he or she knows is subject to that authority to engage in sexual activity, the finder of fact may infer that there was an implied threat inherent in the relationship.

If the threat to take an adverse action was made more than one year prior to the act of sexual intercourse, the finder of fact may infer that the accused did not have the requisite

---

[269] *Id.*

[270] *See* Michael G. Hilf, *Marital Privacy and Spousal Rape*, 16 NEW ENG. L. REV. 31, 34 (1980)(arguing that rape prosecutions intrude upon the intimacies of the marital relationship); *But see,* Diana E. H. Russell, *Rape in Marriage* 190-191, 198-199 (2d ed. 1990) (arguing that violent spousal rape is common and traumatic, but noting that some types of wife rape are "not particularly traumatic") (cited in KADISH & SHULHOFFER, CRIMINAL LAW AND ITS PROCESSES 367 (1995)).

intent to commit the offense. Although this one-year time frame might seem arbitrary, it is based upon the fact that most military and civilian personnel receive yearly evaluation reports. It is also based upon the fact that the various military basic training and advanced individual training courses last less than a year.

6. Possible Defenses

The proposed offense would recognize two affirmative defenses that might be available to an accused. Both of these defenses serve to negate the specific intent required of the accused.

a. Voluntary Intoxication.

Because the proposed offense would be a specific intent crime, voluntary intoxication would constitute a defense. Accordingly, an accused who is too intoxicated to form the specific intent to cause another person to submit to sexual intercourse, either through the use of a threat of adverse action or through the misuse of the accused's position of authority, would not be guilty of "coercive sexual intercourse."

b. Voluntary Initiation by Victim

It would also be an affirmative defense for the accused to prove by a preponderance of the evidence that the victim voluntarily initiated the sexual encounter and that the accused took affirmative steps to eliminate the threat of adverse action or the inherently coercive nature of the relationship. For example, the accused could show that the victim initiated the sexual contact and that the accused notified his or her superior of the potential sexual activity prior to or immediately after engaging in the act of sexual

intercourse. The accused could also ask for an immediate transfer for himself or for herself. It would, however, be impermissible for the accused to eliminate the coerciveness of the relationship by taking a personnel action against the victim, such as transferring the victim to another unit or separating the victim from service.

It is anticipated that the successful use of this defense would be very infrequent. It would operate in much the same way as withdrawal from a conspiracy. As such it would exist only in those rare situations in which the victim engages in sexual relations with a person in a position of authority for reasons unrelated to the nature of the relationship or a fear of adverse action.

7. Authorized Punishment

The proposed offense would carry an authorized maximum punishment of a dishonorable discharge, 10 years of confinement, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. In terms of the relative grading of military sexual offenses, the proposed maximum punishment would place the offense of coercive sexual intercourse well below rape and assault with intent to commit rape, but substantially above indecent assault, extortion, fraternization, maltreatment of a subordinate, adultery, assault consummated by a battery, and simple assault.[271]

VII. Comparison to Similar Statutes

Although the federal government and most states have reformed their common law-based rape statutes, no American jurisdiction has yet created a crime of "coercive sexual

[271] *See* discussion, *supra* Part V.C.3.

intercourse."[272] In that regard, the proposed amendment would be breaking new ground. However, the notion of statutorily incorporating non-violent coercive conduct as a component of a jurisdiction's criminal prohibitions against unlawful intercourse is not a new one. For example, the American Law Institute's Model Penal Code, Title 18 of the United States Code, and various state criminal codes have done so to varying degrees.

A. Model Penal Code Approach

In 1962, the American Law Institute presented the legal community with the Model Penal Code.[273] This penal code contained a proposed revision of rape law that divided the traditional crime of rape into several different offenses such as first degree rape, rape, and gross sexual imposition.[274] The offense of gross sexual imposition was listed as a

---

[272] Delaware has, however, created a similar crime titled "sexual extortion."

[273] *See* MPC COMMENTARIES, *supra* note 12, at 275.

[274] MODEL PENAL CODE § 213.1

> § 213.1. **Rape** and Related Offenses.
>
> (1) **Rape.** A male who has sexual intercourse with a female not his wife is guilty of **rape** if:
>
> (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
>
> (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
>
> (c) the female is unconscious; or
>
> (d) the female is less than 10 years old.
>
> **Rape** is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.
>
> (2) Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

felony of the third degree, and prohibited a man from having sexual intercourse with a female not his wife by causing her to "to submit by any threat that would prevent resistance by a woman of ordinary resolution."[275]

In many ways, the proposed offense of coercive sexual intercourse is very similar to Model Penal Code offense of gross sexual imposition. Both of the offenses were drafted in response to the difficulties that courts had experienced in "drawing a line between forcible rape on the one hand and reluctant submission on the other, between true aggression and desired intimacy."[276] Like the author of this thesis, the drafters of the Model Penal Code were particularly concerned with the "considerable difficulty" the appellate courts have had in determining "how the elements of force or threat should be defined" in cases in which there was no actual force.[277] In an attempt to end this confusion, the respective drafters created a specific lesser felony offense to cover a less violent form of unlawful sexual intercourse in which a woman is coerced into engaging in the act of sex. Both of the offenses also specifically include vaginal, oral, and anal intercourse in their definitions of "sexual intercourse." Furthermore, in deference to the

---

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or

(b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or

(c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

[275] *Id.* at 275.

[276] *Id.* at 279-80.

[277] *Id.* at 279.

marital relationship and in recognition of the difficulties inherent in the attempted regulation of non-violent sexual marital conduct, both offenses retain the spousal exemption.[278] The offense of gross sexual imposition differs from the proposed offense of coercive sexual intercourse in that it is not gender neutral and it requires an actual threat to be conveyed. Although the offense of coercive sexual intercourse could be committed through the use of such a threat, it could also be committed where the accused misuses his inherent situation of dominance and control. Although the proposed offense would incorporate some of the features of the Model Penal Code, it would actually encompass a much wider range of misconduct.

B. The Federal Approach

In 1986, Congress repealed all the existing federal rape statutes and created a new comprehensive Sexual Abuse Chapter under Title 18.[279] Congress took this drastic action, in part, because Congress determined that it was no longer "possible to delineate with certainty the outer limits of the conduct proscribed by [the existing rape] statute."[280] In an effort to cure the problems of vagueness, Congress eliminated the term "rape" and divided sexual abuse crimes into the following distinct offenses according to their severity:

---

[278] *Id.* at 341-42.

[279] Sexual Abuse Act of 1986, Pub. L. No. 99-654, 100 Stat. 3660 (1986), *codified at* 18 U.S.C. 2241-2245 (1988).

[280] H.R. REP. NO. 99-594, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6186, 6188. Congress was also concerned that the common law definition of rape that had become a part of federal law of rape, "gave rise to the development of a number of doctrines that--inappropriately and unwarrantedly--focused a rape trial on the conduct of the victim." *Id.* at 11. *See also* discussion, *supra* note 45. Specifically, Congress wanted to move away from the traditional rape law doctrine of consent and focus the trial on the conduct and state

(1) Sexual abuse resulting in death;[281]

(2) Aggravated sexual abuse;[282]

---

of mind of the defendant. H.R. REP. NO. 99-594 at 10. Accordingly Congress eliminated the requirement that the victim resist her attacker and that the prosecution prove "lack of consent" as an element. *Id.* at 11.

[281] § 2245. Sexual abuse resulting in death

> A person who, in the course of an offense under this chapter, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

18 U.S.C.A. § 2245 (1999).

[282] § 2241. Aggravated sexual abuse

> (a) By force or threat.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act--
>
> (1) by using force against that other person; or
>
> (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;
>
> or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.
>
> (b) By other means.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--
>
> (1) renders another person unconscious and thereby engages in a sexual act with that other person; or
>
> (2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--
>
> (A) substantially impairs the ability of that other person to appraise or control conduct; and
>
> (B) engages in a sexual act with that other person;
>
> or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.
>
> (c) With children.--Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained

(3) Sexual abuse;[283]

(4) Sexual abuse of a minor or a ward;[284] and

---

the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement.--In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

18 U.S.C.A. § 2241 (West 1998)(as amended by The Protection of Children from Sexual Predators Act of 1998, Pub. L. 105-314 § 301, 112 Stat. 2978 (1998).

[283] § 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is--

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C.A. § 2242 (1998)

[284] § 2243. Sexual abuse of a minor or ward

(a) Of a minor.--Whoever in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who--

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(5) Abusive sexual conduct.[285]

(b) Of a ward.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is--

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) Defenses.--(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement.--In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew--

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

18 U.S.C.A. § 2243 (1998)(as amended by The Protection of Children from Sexual Predators Act of 1998, Pub. L. 105-314 § 301, 112 Stat. 2979 (1998).

[285] § 2244. Abusive sexual contact

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if so to do would violate--

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than six months, or both.

Like the proposed amendment, each of the new federal offenses describes "the conduct that is prohibited as well as any circumstance that must exist at the time of the conduct" and "the state of mind that the defendant must have had."[286] Aggravated sexual abuse resulting in death (§ 2245) and sexual abuse (§ 2241) proscribe conduct that would clearly have constituted rape at common law. They specifically deal with sexual intercourse caused by physical violence, threat of violence, or incapacitation. Sexual abuse (§ 2241) encompasses the traditional "constructive force" situations where the victim is mentally or physically incompetent. Abusive sexual contact (§ 2244) is basically an indecent assault statute that prohibits certain forms of sexual contact, rather than sexual abuse.[287]

> (b) In other circumstances.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both.
>
> (c) Offenses involving young children.—If the sexual contact that violates this section is with an individual who has not yet attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

18 U.S.C.A. § 2244 (1998)(as amended by The Protection of Children from Sexual Predators Act of 1998, Pub. L. 105-314 § 302, 112 Stat. 2979 (1998).

[286] H.R. Rep. No. 99-594, *supra* note 280, at 13.

[287] Sexual contact and sexual contact are defined in § 2246. A sexual act is defined as:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;
>
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

The federal offenses of sexual abuse (§ 2242) and sexual abuse of a minor (§ 2243) are most relevant to the proposed amendment of Article 120, UCMJ in that they deal with some of the situations in which the military appellate courts have applied and misapplied the "parental duress" theory of "constructive force." Sexual abuse (§ 2242) is very similar to the proposed offense in that it specifically prohibits a person from "caus[ing] another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping)."[288] Sexual abuse of a minor or ward (§ 2243), on the other hand, protects two narrowly defined classes of individuals who are in special need of protection: minors between 12 and 16 years of age and persons who are in official detention under custodial, supervisory, or disciplinary authority.[289]

The offense of sexual abuse is similar to the proposed offense of coercive sexual intercourse in that they both punish non-violent threats that cause another person to submit to unwanted sexual intercourse. Likewise, sexual abuse of a minor or ward is

---

> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

18 U.S.C.A. § 2246 (1998) (as amended by The Protection of Children from Sexual Predators Act of 1998, Pub. L. 105-314 § 301, 112 Stat. 2979 (1998). The term sexual contact is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

Id.

[288] *See Simpson supra* note 32. In the highly publicized trial of a drill instructor at the Aberdeen Proving Grounds who was charged with raping several trainees under his supervision, the Government initially attempted to use § 2242 in the prosecution. Record at 656.

[289] *See* 18 U.S.C.A. § 2243. (West 1998).

similar to the proposed offense in that it protects persons who are subjected to an inherently coercive situation. The federal statute defines two specific classes of victims, whereas the proposed statute allows the finder of fact to make the determination as to whether or not there was a unique position of dominance and control. The proposed offense also differs from sexual abuse and sexual abuse of a minor or ward in that it requires a slightly higher standard of intent by requiring that the accused acted "purposely" rather than "knowingly." [290]

A good argument could be made that the Congress should apply the federal sexual abuse scheme to the military. In fact, at least one military prosecutor has attempted to make use of the federal sexual abuse statute in a high-profile case involving a drill sergeant who engaged in violent and non-violent coercive intercourse with several of his trainees.[291] In that case, several of the trainees had submitted to the accused, not because they were in fear of physical harm, but because he was in a unique situation of dominance and control in relation to them. In light of the uncertainty in the law caused by the misapplication of the "parental duress" doctrine, the prosecutor sought to hedge the government's bets by charging sexual abuse as well as rape.[292] Even though the text of the federal sexual abuse statute more accurately reflected the nature of the accused's conduct than did the text of Article 120(a), the military judge found that Article 120(a), UCMJ preempted the use of the sexual abuse statute. Based upon his reading of *United States v. Clark*, the military judge found that the "parental duress" theory of "constructive

[290] H.R. REP. NO. 99-594, at 13.

[291] *See Simpson, supra* note 32 at 656.

[292] *Id.*

force" would apply to allow the accused to be convicted of rape under article 120(a). Accordingly, he dismissed those charges and specifications with prejudice.[293] Thereafter, the accused was convicted of numerous specifications of rape under the "parental duress" theory of "constructive force."

Although the federal sexual abuse statute would actually have been more appropriate in describing the accused's misconduct, there are some very good reasons not to apply the entire sexual abuse statute to the UCMJ in place of rape, sodomy and other military sex crimes. To begin with, some offenders, especially those using violence or the threat of violence, deserve to be stigmatized with a rape conviction rather than an "aggravated sexual abuse" conviction. By retaining the separate offenses of rape and carnal knowledge, while adding the proposed offense of coercive sexual intercourse, the military would be able to adequately label offenders. Furthermore, there is no overwhelming need for the military to abandon the rape and carnal knowledge offenses. The only real difficulties that the military appellate courts have had in regard to rape law all stemmed from the misapplication of the "parental duress" doctrine. These difficulties can easily be solved with the incorporation of "coercive sexual intercourse."

C. State Approaches

Although no state has enacted a "coercive sexual intercourse" offense, many state statutes now specifically allow for certain types of "nonphysical forms of coercion" to substitute for the traditional requirement of "physical force or threat of physical force."[294]

---

[293] *Id.* at 735.

[294] Patricia J. Falk, 64 BROOK. L. REV 39, 42 (1998).

However, most of these states allow for such a substitution only in sexual crimes that are punished less severely than the most serious sexual offenses in those states.[295] For example, Ohio includes "sexual conduct by coercion" as an element of sexual battery, but not rape.[296] Likewise, Vermont criminalizes coercion for sexual assault, but not aggravated sexual assault.[297] These statutes are similar to the proposed amendment of Article 120 because they punish violent and nonviolent means of making a person give up their sexual autonomy.

Many state codes initially read as if they prohibit non-violent coercive tactics but actually do not because of a restrictive definition of coercion or threatened retaliation. The Tennessee Code, for example provides that "force or coercion" can form the basis of rape, as opposed to aggravated rape, but limits the definition to either the threat of kidnapping, extortion, force, or violence, or to the application of parental or custodial authority over a child.[298] Rhode Island also incorporates coercion into its first-degree sexual assault offense, but then defines coercion to include only threats of murder, bodily injury, kidnapping, or physical violence.[299] Other states prohibit the coercing of a victim

---

[295] *Id.*

[296] OHIO REV. CODE ANN. § 2907.03 (Anderson 1996) (prohibiting sexual battery). *Id* at § 2907.02 (prohibiting rape).

[297] VT. STAT. ANN. Tit. 13 § 3252 (1998) (prohibiting sexual assault); *Id* at § 3253 (prohibiting aggravated sexual assault).

[298] *See e.g.,* TENN. CODE ANN. § 39-13-501-505.(1997). The Tennessee code defines "coercion" as a "threat of kidnapping, extortion, force or violence to be performed immediately or in the future or the use of parental, custodial, or official authority over a child less than fifteen (15) years of age." *Id.* at § 501. It is interesting to note, however, that the Tennessee Court of Criminal Appeals has held that "a rational jury could have properly found the element of coercion" based upon the appellant's threats to "tell people that [the victim] was a homosexual." State v. McKnight, 900 S.W.2d 36, 50 (Tenn.Cr.App. 1994). *McKnight,* however, should probably be read to expansively because the victim was a 13-year-old child. *Id.* at 44.

[299] *See* R.I. GEN. LAWS § 11-37-1(2).

by threatening to "retaliate" against the victim, but then limit the definition of "retaliation" to threats of kidnapping, false imprisonment, extortion, or the infliction of extreme physical pain, injury, or death.[300] Because these state statutes too narrowly define coercion, they would not adequately address the military's problem's related to the misapplication of the "parental duress" theory of "constructive force."

Although Vermont prohibits the "threatening or coercing" of a person as a means of compelling the engagement of a sexual act, neither the statute nor the case law defines what type of "coercion" will suffice for a "sexual assault."[301] Only New Hampshire

---

[300] *See e.g.*, CAL. PENAL CODE § 261 (a)(6) (West Supp. 1999) (defining "threatening to retaliate" as "a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death"); FLA. STAT. ANN. Ch 794.011(1)(f) (West Supp. 1999)(defining retaliation as including "threats of future physical punishment, kidnapping, false imprisonment or forcible confinement"); MICH. COMP. LAWS § 750.520b(1)(f)(iii) (West Supp. 1998) (defining "to retaliate" as "threats of physical punishment, kidnapping, or extortion").

[301] *See id.* at 13 § 3251-52. The text of Vermont's "Sexual Assault" statute provides:

> § 3251 Definitions
>
> As used in this chapter:
>
> (1) A "sexual act" means conduct between persons consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another.
>
> (2) "Sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual acts, use of contraceptives, living arrangement and mode of living.
>
> (3) "Consent" means words or actions by a person indicating a voluntary agreement to engage in a sexual act.
>
> (4) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes substantial loss or impairment of the function of any bodily member or organ, or substantial impairment of health, or substantial disfigurement.
>
> (5) "Bodily injury" means physical pain, illness or any impairment of physical condition.
>
> (6) "Actor" means a person charged with sexual assault or aggravated sexual assault.

(7) "Deadly force" means physical force which a person uses with the intent of causing, or which the person knows or should have known would create a substantial risk of causing, death or serious bodily injury.

(8) "Deadly weapon" means

(A) any firearm; or

(B) any weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury.

§ 3251 Sexual Assault

(a) A person who engages in a sexual act with another person and

(1) Compels the other person to participate in a sexual act:

(A) Without the consent of the other person; or

(B) By threatening or coercing the other person; or

(C) By placing the other person in fear that any person will suffer imminent bodily injury; or

(2) Has impaired substantially the ability of the other person to appraise or control conduct by administering or employing drugs or intoxicants without the knowledge or against the will of the other person; or

(3) The other person is under the age of 16, except where the persons are married to each other and the sexual act is consensual; or

(4) The other person is under the age of 18 and is entrusted to the actor's care by authority of law or is the actor's child, grandchild, foster child, adopted child or step-child;

shall be imprisoned for not more than 20 years, or fined not more than $10,000.00, or both.

(b) A person who engages in a sexual act with another person under the age of 16 and

(1) the victim is entrusted to the actor's care by authority of law or is the actor's child, grandchild, foster child, adopted child or step-child; or

(2) the actor is at least 18 years of age, resides in the victim's household and serves in a parental role with respect to the victim;

shall be imprisoned for not more than 35 years, or fined not more than $25,000.00, or both.

defines "retaliation" in such a way that it can be broadly construed.[302] Under New Hampshire's sexual assault provisions, "retaliate means to undertake action against the interests of the victim, including but not limited to:

(a) Physical or mental torment or abuse.

(b) Kidnapping, false imprisonment or extortion.

(c) Public Humiliation or disgrace." [303]

In fact, the Supreme Court of New Hampshire has construed "retaliation" so broadly as to include threats of mental punishment, economic reprisal, or public humiliation.[304] This definition is actually too broad in that it includes certain means of coercion that are currently being addressed in the military via the traditional "constructive force" doctrine. By including such coercive means as threatening physical abuse and kidnapping as sexual assault instead of rape, New Hampshire appears to downgrade the traditional crime of rape and make it seem less offensive.

Only one state has created a special statute designed to address conduct similar to that addressed by the proposed amendment to the UCMJ and that adequately captures the nature of the offense. Instead of incorporating "coercion" into its statutory "unlawful sexual intercourse" scheme, Delaware created the new offense of sexual extortion.[305]

---

[302] N.H. REV. STAT. ANN. § 632-A:1 II (Supp. 1998).

[303] *Id.*

[304] *See* State v. Lovely, 480 A2d 847, 850 (N.H. 1984) (involving young homeless man who was befriended, employed, and then sexually assaulted by a liquor store manager).

[305] DEL. CODE. ANN. tit. 11, § 776 (Supp. 1998). Deleware's sexual extortion statute provides:

This offense is unique in that it prohibits an extremely broad range of threats that could be used to coerce another into engaging in "any sexual act involving contact, penetration, or intercourse."[306] Delaware's sexual extortion statute is somewhat broader in coverage in that encompasses everything from threatened physical injury to "any other act which is calculated to harm another person materially with respect to the other person's health, safety, business, calling, career, financial condition, reputation or personal relationships."[307] It is similar to the proposed statute in that it requires specific intent that the accused compel or induce another into engaging in a vaginal, oral, and anal

---

§ 776 Sexual extortion; class E felony.

A person is guilty of sexual extortion when the person intentionally compels or induces another person to engage in any sexual act involving contact, penetration or intercourse with the person or another or others by means of instilling in the victim a fear that, if such sexual act is not performed, the defendant or another will:

(1) Cause physical injury to anyone;

(2) Cause damage to property;

(3) Engage in other conduct constituting a crime;

(4) Accuse anyone of a crime or cause criminal charges to be instituted against anyone;

(5) Expose a secret or publicize an asserted fact, whether true or false, intending to subject anyone to hatred, contempt or ridicule;

(6) Falsely testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(7) Perform any other act which is calculated to harm another person materially with respect to the other person's health, safety, business, calling, career, financial condition, reputation or personal relationships.

Sexual exploitation is a class E felony. *Id.*

[306] *Id.*

[307] *Id.*

intercourse by means of instilling fear. Because it prohibits such a broad range of conduct, however, it only carries a maximum sentence of five years of confinement.[308]

Although Delaware's sexual extortion statute could easily be incorporated into the UCMJ, the proposed offense of coercive sexual intercourse would be better suited to the military's needs. Because it specifically addresses "the unique situation of dominance and control" upon which the military appellate courts have based their misapplication of the "parental duress" theory, the adoption of the proposed offense would limit the military courts to a traditional application of the "constructive force" doctrine in rape cases. Congress may, however, wish to change the name of the proposed statute to sexual extortion, as that name also adequately captures the essence of the offense, albeit without specifically referring to the act of intercourse.

VIII. Conclusion

During the course of the last two centuries, the United States armed forces have made great strides in prosecuting soldiers, sailors, airman, and marines who have committed the heinous crime of rape. From the American Revolution to the Civil War, courts-martial had no jurisdiction over a military rapist. Nonetheless, the military establishment made a sincere effort to ensure a soldier, sailor, or marine that was suspected of rape, was turned over to the local state courts for trial under the common law. In fact, the Articles of War made it a military offense for a commanding officer not to take such an such action. During the Civil War, Congress bestowed jurisdiction over military rapists to military courts, but severely limited that jurisdiction to times of conflict and to extra-

[308] *Id.* at § 4205 (b)(5).

territorial offenses. Finally, in 1949, Congress authorized the military courts to try military rapists in all places and at all times.

As courts-martial began prosecuting military rapists under the UCMJ, the military appellate courts adopted and applied the traditional common law doctrine of "constructive force" in order to affirm the convictions of those rapists who had not used actual force, but who had nonetheless seriously violated a female's sexual autonomy. This traditional application of the "constructive force doctrine" was extremely limited in that applied only to situations in which the victim was unable or unwilling to resist out of a reasonable fear of bodily harm or in which the victim was in some way incompetent. In the 1980s the military appellate courts took another step forward by also adopting, from the civilian courts, and then applying the "parental duress" theory of "constructive force" to those situations in which a father or a stepfather made use of his authoritarian power to compel a minor child to acquiesce to his sexual desires without resorting to force or the threat of force.

After adopting the "parental duress' theory and applying it for its intended purpose, the military appellate courts began to step out in front of their civilian counterparts by misapplying the theory to instances in which the victim was a fully competent adult who acquiesced, not out of fear of bodily harm, but out of fear of some other adverse action. Through this well-intentioned misapplication of the "parental duress" theory, the military appellate courts created a great deal of confusion as to what conduct actually constituted the very serious offense of rape. This confusion, in turn, has opened door for a potential constitutional challenge of Article 120(a), UCMJ, encouraged the overcharging of

nonviolent sexual offenses by prosecutors, and created the appearance of sentence disparity.

This thesis contains a workable solution to end most of the confusion. This solution would not require a wholesale reform of military rape law, nor would it cause a great upheaval of well-settled case law. Although it would adversely affect *Clark* and its progeny as they apply to the law of rape, the proposed solution would make use of the rationale behind *Clark.* Like *Clark* and the cases that followed, the proposed amendment would protect persons from being coerced into unwanted intercourse through the use of something short of violence. The proposal, unlike *Clark* would do so in a rational manner without forcing the courts to misapply the "parental duress" theory of constructive force to punish such a miscreant. This solution is unique in that it borrows concepts from military case law, the Model Penal Code, the Sexual Abuse Act of 1986, and various state statutes that have addressed the issue of coercion and adapts those concepts to the military environment.

By adopting the proposed revision, Congress could clearly delineate three separate offenses involving unlawful sexual intercourse. In so doing, Congress would end the present confusion as to what actually constitutes the offense of rape, insulate Article 120 from a possible constitutional challenge for vagueness, and help ensure that the nomenclature and maximum punishment for the crimes enumerated in Article 120 accurately reflect their differing natures and degrees of severity.

APPENDIX A

APPENDIX A

Example of Article 120, UCMJ Incorporating the Proposed Amendment

§ 920. Art. 120. Rape, carnal knowledge, and coercive sexual intercourse.

(a) Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person--

(1) who is not that person's spouse; and

(2) who has not attained the age of sixteen years;

is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Any person subject to this chapter who purposely causes someone, other than his or her lawful spouse, to--

(1) unwillingly engage in an act of sexual intercourse by threatening to take a non-violent adverse action against that person, or some other person, such as would cause a reasonable person in the position of the person being threatened to unwillingly submit to an act of sexual intercourse; or

(2) unwillingly engage in an act of sexual intercourse by misusing a unique position of dominance and control in such a way as would cause a reasonable person in the position of the person being threatened to unwillingly submit to an act of sexual intercourse; is guilty of coercive sexual intercourse and shall be punished as a court-martial shall direct.

(d) Sexual intercourse includes vaginal, anal, and oral intercourse.

(e) Penetration, however slight, is sufficient to complete each of these offenses.

(f)(1) In a prosecution under subsection (b), it is an affirmative defense that--

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that that person had at the time of the alleged offense attained the age of sixteen years.

(2) The accused has the burden of proving a defense under paragraph (1) by a preponderance of the evidence.

APPENDIX B

APPENDIX B

Example of the Manual for Courts-Martial Explanation of Article 120, UCMJ

(If Amended as Proposed)

45. Article 120—Rape, carnal knowledge, and sexual intercourse

a. *Text.*

"(a) Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person--

(1) who is not that person's spouse; and

(2) who has not attained the age of sixteen years; is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Any person subject to this chapter who purposely causes someone, other than his or her lawful spouse, to--

(1) unwillingly engage in an act of sexual intercourse by threatening to take a non-violent adverse action against that person, or some other person, such as would cause a reasonable person in the position of the person being threatened to unwillingly submit to an act of sexual intercourse; or

(2) unwillingly engage in an act of sexual intercourse by misusing a unique position of dominance and control in such a way as would cause a reasonable person in the position of the person being threatened to unwillingly submit to an act of sexual intercourse; is guilty of coercive sexual intercourse and shall be punished as a court-martial shall direct.

(d) Sexual intercourse includes vaginal, anal, and oral intercourse.

(e) Penetration, however slight, is sufficient to complete each of these offenses.

(f)(1) In a prosecution under subsection (b), it is an affirmative defense that--

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that that person had at the time of the alleged offense attained the age of sixteen years.

(2) The accused has the burden of proving a defense under paragraph (1) by a preponderance of the evidence."

b. Elements.

(1) *Rape.*

(a) That the accused committed as act of sexual intercourse; and

(b) That the act of intercourse was done by force and without consent.

(2) *Carnal knowledge.*

(a) That the accused committed an act of sexual intercourse with a certain person;

(b) That the person was not the accused's souse; and

(c) That at the time of the sexual intercourse the person was under 16 years of age.

(3) *Coercive sexual intercourse by threat.*

(a) That the accused purposely caused someone, other than his or her spouse, to submit to an act of sexual intercourse;

(b) That the accused caused the submission by knowingly threatening to take a serious nonviolent adverse action against the person being threatened or some other person;

(c) That the threatened adverse action is of sufficient severity to cause a reasonable person in the position of the person being threatened to submit to unwanted intercourse; and,

(d) That the person being threatened submitted to the sexual intercourse in fear of the threatened action.

(2) *Coercive intercourse through misuse of position.*

(a) That the accused purposely caused someone, other than his or her spouse, to submit to an act of sexual intercourse;

(b) That the accused caused the submission by knowingly making use of a unique position of dominance and control; and,

(c) That the person being threatened submitted to the sexual intercourse because of the existence of the unique position of dominance and control.

c. *Explanation.*

(1) *Rape.*

(a) *Nature of offense.* Rape is sexual intercourse by a person, executed by force and without consent of the victim. It may be committed on a victim of any age. Any penetration, however slight, is sufficient to complete the offense

(b) *Force and lack of consent.* Force and lack of consent are necessary to the offense. Thus, if the victim consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the victim is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that he or she is incapable of understanding the nature of the act is not consent.

(c) *Character of victim. See* Mil. R. Evid. 412 concerning rules of evidence relating to an alleged rape victim's character.

(2) *Carnal knowledge.* Carnal knowledge is sexual intercourse under circumstances not amounting to rape, with a person who is not the accused's spouse and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is a defense however that the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age.

(3) *Coercive sexual intercourse.*

(a) *Nature of the offense.* Coercive sexual intercourse is similar to rape in that the accused causes a person to unwillingly submit to an unwanted act of sexual intercourse. The primary difference lies with the methods that are used to accomplish the intercourse. A rapist uses force, either actual or constructive, to overcome the victim's resistance. A person guilty of coercive sexual intercourse either uses threats of adverse action, or his or her unique position of dominance and control to gain the victim's submission to an act of sex. Article 120(c)(1) is applicable in those situations in which the accused threatens to take an adverse punitive, administrative, or economic action. Such a threat may be express or implied. Article 120 (c)(2) is applicable to inherently

coercive situations in which the accused holds a unique situation of dominance and control over his victim by virtue of a professional, military, or familial relationship.

(b) Intent. Coercive sexual intercourse is a specific intent crime. It requires the specific intent to cause the victim to submit to sexual intercourse either through the use of a threat of adverse action or through the misuse of ones position of authority. The clearest indicator of an accused's specific intent to commit the proposed offense would be found where the accused expressly threatens to take an adverse action if the victim refuses his sexual advances. The closer in time the threat is to the act of intercourse, the more likely it will be the accused had the specific intent. Where the accused hints or refers to the accused's ability to take an adverse action should the victim fail to submit, such hint or reference may constitute at threat. In an inherently coercive environment wherein both the accused and the victim are aware or should be aware of the accused's unique situation of dominance and control based upon his or her superior position of authority or rank, the offense is committed where the accused successfully causes the victim to submit.

(c) *Causation.* So long as the accused's threat of adverse action or the existence of the unique position of dominance and control actually motivated the victim's submission, the accused has caused that submission. Although the threat or status must be the proximate cause of the submission it need not be the only cause

(d) *Threat.* Although a threat may be communicated by any means, it must be received by the intended victim. The threat may be expressed or implied, so long as it expresses a present ability, determination, or intent to take an adverse action. Threats of bodily harm or of death, however, do not constitute a threat under this offense. Such threats fall within the realm of the force required for rape.

(e) *Nonviolent Adverse Action.* Nonviolent adverse actions are those actions which are calculated to harm another person materially with respect to the other person's health, safety, business, calling, career, financial condition, reputation or personal relationships. Although nonviolent adverse action covers a wide variety of actions, it does not apply actions that are calculated to cause mere trivial harm.

(f) *Reasonable Person.* A reasonable person in the position of the person submitting will not submit to unwanted intercourse out of fear of a trivial harm. The finder of fact will make a determination as to reasonableness based upon their common experience on whether or not a reasonable person in that position would submit to unwanted sexual intercourse based upon the totality of the circumstances.

(g) *Inferences.* If the accused is actually aware of his unique situation of dominion and control over the victim and the accused thereafter causes the victim to engage in sexual activity, the finder of fact may infer that there was an implied threat inherent in the relationship. If the threat to take an adverse action was made more than one year prior to the act of sexual intercourse, the finder of fact may infer that the accused did not have the requisite intent to commit the offense.

(h) *Possible Defenses.*

(1) *Voluntary Intoxication.* Because the offense requires specific intent, voluntary intoxication would constitute a defense. If an accused is too impaired to form the specific intent to cause the victim to submit to sexual intercourse either through the use of a threat of adverse action or through the misuse of the accused's position of authority, he may not be convicted of the crime.

(2) *Voluntary Initiation by the Victim.* It is an affirmative defense for the accused to prove by a preponderance of the evidence that the victim voluntarily initiated the sexual encounter and that the accused took affirmative steps to eliminate the threat of adverse action or the inherently coercive nature of the relationship. It would not, however, be permissible for the accused to eliminate the coerciveness of the relationship by taking a personnel action against the victim, such as transferring or separating the victim from service.

d. Lesser included offenses.

(1) *Rape.*

(a) Article 128--assault; assault consummated by a battery

(b) Article 134--assault with intent to commit rape

(c) Article 134--indecent assault

(d) Article 80—attempts

(2) *Carnal knowledge.*

(a) Article 134--indecent acts or liberties with a person under 16

(b) Article 80--attempts

(3) Coercive sexual intercourse.

(a) Article 80--attempts

e. *Maximum punishment.*

(1) *Rape.* Death or such other punishment as a court-martial may direct.

(2) *Carnal knowledge with a child under the age of 12 at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(3) *Carnal knowledge with a child who, at the time of the offense, has attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Coercive sexual intercourse*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. *Sample specifications*.

(1) *Rape*.

In that _____ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about _____ 20__, rape _____, (a person who had not attained the age of 16 years).

(2) *Carnal knowledge*.

In that _____ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about _____ 20__, commit the offense of carnal knowledge with _____.

(3) *Coercive sexual intercourse*.

In that _____ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about _____ 20__, commit the offense of coercive sexual intercourse with _____.